No. 16293

# United States Court of Appeals

for the Ninth Circuit

NATIONAL BONDED CARS, INC.,

Appellant,

vs.

FRANCIS B. RYAN, et al.,

Appellees.

# Transcript of Record

**Appeal from the United States District Court for the Northern District of California, Southern Division.**



Phillips & Van Orden Co., 4th & Berry, San Francisco, Calif.—3-13-59

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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## APPEARANCES

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United States District Court for the Northern District of California, Southern Division

Civil Action No. 37635

NATIONAL BONDED CARS, INC.,

Plaintiff,

vs.

FRANCIS B. RYAN, DONALD BROOKS, A. E. HACKING, JAMES CHAMBERS, TRUMAN RENZ, JACK L. ROBERTSON, DONOLD B. LYNCH, NATIONAL BONDED CARS OF SOUTHERN CALIFORNIA, INC., BALBOA INSURANCE COMPANY, THE CENTRAL AGENCY OF SAN FRANCISCO, INCORPORATED; NATION-WIDE AUTOMOBILE DEALERS INSURANCE AGENCY and NATION-WIDE AUTOMOBILE MECHANICAL INSURANCE AGENCY., INC.,

Defendants.

## COMPLAINT

### Count I.

1. The ground upon which the jurisdiction of the court depends is diversity of citizenship between the plaintiff and the defendants, and the amount in controversy herein exceeds $10,000.00, exclusive of interest and costs. Plaintiff is a corporation, created and existing under the laws of the State of New Jersey, having its principal place of business at

120 Morris Avenue, Springfield, New Jersey. Upon information and belief, all of the individual defendants herein are citizens of the State of California and all of the other defendants herein are corporations created and existing under the laws of, and have their principal places of business in, the State of California.

2. Plaintiff is now, and for some years past has been, engaged in the business of inspecting all major mechanical parts of used or new automobiles and issuing warranties in connection therewith to purchasers of new and used automobiles throughout the United States, indemnifying said purchasers against the cost of repair or replacement of the automobile parts covered by said warranties.

3. On or about December 12, 1955, plaintiff entered into an agreement in writing with defendant Francis B. Ryan (hereinafter referred to as "Ryan"), a copy of which is hereto annexed, marked Exhibit A and made a part of this complaint.

4. On or about February 7, 1957, said agreement was superseded by another agreement in writing between plaintiff and Ryan, a copy of which is hereto annexed, marked Exhibit B and made a part of this complaint. By virtue of said agreements Ryan became, and at all times since December 12, 1955, acted and continues to act as, plaintiff's area representative in the northerly portion

of the State of California and the northerly portion of the State of Nevada.

5. Plaintiff has performed all of the conditions of said agreements to be performed by it, and all the conditions precedent of said agreements have occurred.

6. Ryan failed and neglected to perform said agreements in that during the period in which he acted as plaintiff's representative he wilfully mismanaged plaintiff's business in the aforesaid territory, allowed the cost of approved repairs under plaintiff's warranties on automobiles approved by inspectors supervised by him to remain excessive after warning by plaintiff, failed to devote his full time and attention and best efforts exclusively to the conduct of plaintiff's business in said territory, and engaged in another business which was and is competitive to the business conducted by plaintiff in said territory and diverted the accounts and customers of plaintiff to said other business.

Count II.

7. Plaintiff repeats and realleges each and every allegation contained in Paragraphs 1, 2, 3, 4 and 5 of this complaint with the same effect as if repeated at length in this paragraph.

8. In the course of its business plaintiff has conceived and developed certain unique ideas, forms, plans, systems and knowledge of doing business, including the general procedure, extent of inspec-

tion method and control of the issuance of warranties, repair procedure and the manner of verifying and paying all costs of repairs covered by the warranties issued by plaintiff. (Hereinafter said ideas, form, plans, systems and knowledge of doing business are collectively referred to as "plaintiff's trade secrets.")

9. Plaintiff's trade secrets were conceived and developed by plaintiff as the result of the expenditure of considerable time, effort and money and were known only to plaintiff and its officers, directors and employees.

10. In connection with the appointment of Ryan as plaintiff's area representative, plaintiff divulged to Ryan plaintiff's trade secrets with the understanding that they were to be used by Ryan only in connection with and for the furtherance of plaintiff's business.

11. In order to assist him in the conduct of plaintiff's business, Ryan, some time in 1957, employed defendants, Truman Renz (hereinafter referred to as "Renz") and Donald Brooks (hereinafter referred to as "Brooks") as salesmen and in the course of their employment Renz and Brooks also came to know plaintiff's trade secrets.

12. Notwithstanding the confidential nature of plaintiff's trade secrets, Ryan, Renz and Brooks wilfully and maliciously, with intent to injure plaintiff's business, have disclosed and continue to disclose plaintiff's trade secrets to many parties out-

side of plaintiff's organization, including all of the other defendants herein.

Count III.

13. Plaintiff repeats and realleges each and every allegation contained in paragraphs 1 and 2 of this complaint with the same effect as if repeated at length in this paragraph.

14. On or about December 12, 1955, plaintiff entered into an agreement in writing with Eugene B. O'Brien and Defendant A. E. Hacking (hereinafter referred to as "Hacking"), a copy of which is hereto annexed, marked Exhibit C and made a part of this complaint.

15. On or about October 8, 1956, said agreement was superseded by another agreement in writing between plaintiff and Hacking, a copy of which is hereto annexed, marked Exhibit D and made a part of this complaint.

16. By virtue of said agreements, Hacking became and at all times until on or about November 21, 1957, acted as plaintiff's area representative in the southerly portion of the State of California.

17. On or about November 21, 1957, Hacking's franchise from plaintiff for the southerly portion of the State of California was assigned to defendant, National Bonded Cars of Southern California, Inc. (hereinafter referred to as "National Bonded Cars of Southern California"), a corporation con-

trolled by Hacking and Defendant James Chambers (hereinafter referred to as "Chambers"), who are, respectively, the president and vice-president thereof.

18. By virtue of said assignment National Bonded Cars of Southern California became, and at all times since November 21, 1957, acted and continues to act as, plaintiff's area representative in the southerly part of the State of California.

19. Plaintiff has performed all the conditions of the aforesaid agreements with Hacking to be performed by it, and all the conditions precedent of the said agreements have occurred.

20. Hacking and National Bonded Cars of Southern California, Inc., have failed and neglected to perform said agreements in that during the respective periods in which they acted as plaintiff's representative they wilfully mismanaged plaintiff's business in the aforesaid territory, allowed the cost of approved repairs under plaintiff's warranties on automobiles approved by inspectors supervised by them to remain excessive after warning by plaintiff, failed to devote their full time and attention and best efforts exclusively to the conduct of plaintiff's business in said territory, and engaged in another business which was and is competitive to the business conducted by plaintiff in said territory and diverted the accounts and customers of plaintiff to said other business.

Count IV.

21. Plaintiff repeats and realleges each and every allegation contained in paragraphs 1, 2, 8, 9, 14, 15, 16, 17, 18 and 19 of this complaint with the same effect as if repeated at length in this paragraph.

22. In connection with the appointment of Hacking as plaintiff's area representative, plaintiff divulged to Hacking plaintiff's trade secrets with the understanding that they were to be used by Hacking only in connection with and for the furtherance of plaintiff's business.

23. In order to assist him in the conduct of plaintiff's business, Hacking, some time in 1957, employed Chambers as his assistant and in the course of his employment Chambers also came to know plaintiff's trade secrets.

24. Notwithstanding the confidential nature of plaintiff's trade secrets, Hacking and Chambers wilfully and maliciously, with intent to injure plaintiff's business, have disclosed and continue to disclose plaintiff's trade secrets to many parties outside of plaintiff's organization, including all of the other defendants herein.

Count V.

25. Plaintiff repeats and realleges each and every allegation contained in paragraphs 1 through 24, inclusive, of this complaint with the same effect as if repeated at length in this paragraph.

26. Upon information and belief, at all times herein mentioned or referred to Defendants Jack L. Robertson (hereinafter referred to as "Robertson"), Donald B. Lynch (hereinafter referred to as "Lynch"), Balboa Insurance Co. (hereinafter referred to as "Balboa"), The Central Agency of San Francisco, Incorporated (hereinafter referred to as "Central"), Nation-Wide Automobile Dealers Insurance Agency (hereinafter referred to as "NADIA"), and Nation-Wide Automobile Mechanical Insurance Agency, Inc. (hereinafter referred to as "NAMIA"), had full knowledge of the aforesaid agreements between plaintiff and Ryan and between plaintiff and Hacking and of the trust and confidence and trade secrets reposed by plaintiff in Ryan and Hacking and, through them, in Renz, Brooks and Chambers.

27. During the period in which Ryan, Hacking and National Bonded Cars of Southern California, Inc., have acted as plaintiff's area representatives, upon information and belief, all of the defendants herein conspired to destroy the business of plaintiff and to divert its accounts and customers to competing business organizations in which said defendants had and now have an interest.

28. Upon information and belief, in furtherance of said conspiracy, (a) Ryan, Hacking, National Bonded Cars of Southern California, Inc., Renz, Brooks and Chambers, while associated with plaintiff, wilfully and unknown to plaintiff, diverted

existing and prospective customers and accounts from plaintiff to NADIA and NAMIA, caused plaintiff's warranty certificates to issue on defective automobiles for the purpose of causing plaintiff to suffer excessive losses by way of claims; (b) Hacking, Chambers and National Bonded Cars of Southern California, Inc., intentionally failed or unreasonably delayed to forward claims to plaintiff's home office for processing with the intent to injure plaintiff's reputation and impair its relations with its customers and accounts, presented fictitious claims to plaintiff and demanded kickbacks from certain repair shops for repair work given to them by said defendants in connection with plaintiff's business; (c) Lynch, Robertson, Balboa and Central induced Ryan, Hacking and National Bonded Cars of Southern California, Inc., to breach Ryan's and Hacking's agreements with plaintiff in the manner outlined in paragraphs 6 and 20 hereof; (d) Lynch, Robertson, Balboa, Central, NADIA and NAMIA induced Ryan, Hacking, Renz, Brooks and Chambers to disclose to them plaintiff's trade secrets and thereafter used said trade secrets for their own benefit and to the detriment of plaintiff; (e) Ryan, Renz and Brooks, with the help and advice of Robertson, Balboa and Central, some time in 1958, created NADIA for the purpose of engaging in the same business as plaintiff in Northern California, and fraudulently concealed Ryan's interest therein; (f) Hacking and Chambers, with the help and advice of Robertson, Balboa and Central,

some time in 1958, created NAMIA for the purpose of engaging in the same business as plaintiff in Southern California, and fraudulently concealed Hacking's interest therein; (g) Central, acting on behalf of Balboa, entered into agreements with NADIA and NAMIA whereby Balboa agreed to insure the mechanical automobile warranties sold by NADIA and NAMIA; (h) NADIA and NAMIA have been and are now engaging in the same business as plaintiff and in connection therewith they have been and are now unfairly competing with plaintiff in that they have been and are now using plaintiff's trade secrets and intentionally and fraudulently misleading customers and accounts of plaintiff into the belief that the business of NADIA and NAMIA is in fact a new insurance program of plaintiff and, by such means, inducing said customers and accounts to switch their business from plaintiff to NADIA and NAMIA; and (i) all of the defendants herein have attempted to induce, and in some cases, have induced, plaintiff's representatives in other areas of the United States to breach their agreements with plaintiff, create competing business organizations and divert plaintiff's customers and accounts thereto.

29. As a result of the foregoing activities by and on the part of defendants, plaintiff has suffered and will, unless defendants are enjoined by this court, continue to suffer, irreparable damage.

Wherefore, plaintiff demands judgment:

A. That Ryan, Hacking, Renz, Brooks, Chambers, National Bonded Cars of Southern California, Inc., NADIA, NAMIA and each of the officers, directors and employees of National Bonded Cars of Southern California, Inc., NADIA and NAMIA be enjoined during the pendency of this action and permanently thereafter from engaging in the business of selling mechanical automobile warranties or in any similar business competitive with plaintiff's business.

B. That Balboa and Central, and each of their officers, directors and employees, be enjoined during the pendency of this action and permanently thereafter from insuring mechanical automobile warranties or any similar guarantees issued by or through NADIA or NAMIA.

C. That the agreement between plaintiff and Ryan, a copy of which is annexed hereto as Exhibit "A," be terminated and that Ryan be enjoined during the pendency of this action and permanently thereafter from acting or purporting to act as plaintiff's area representative in the territory referred to in said agreement.

D. That the agreement between plaintiff and Hacking, a copy of which is annexed hereto as Exhibit "D," be terminated and that Hacking and National Bonded Cars of Southern California, Inc., be enjoined during the pendency of this action and permanently thereafter from acting or purporting

to act as plaintiff's area representatives in the territory referred to in said agreement.

E. That NADIA and NAMIA be required to assign to and vest in plaintiff all of their and/or each of their interests in and to any agreements or franchises with their customers and accounts.

F. That NADIA and NAMIA be required to account to plaintiff for all gains and profits made by each of them in the course of their business from the inception thereof, and to pay over such gains and profits, if any, to plaintiff.

G. That Ryan, Hacking, Renz, Brooks and Chambers be required to account to plaintiff for all salaries, compensation, and other income received by them from or in connection with the operation of a mechanical automobile warranty business or any similar business competitive with plaintiff's business, other than plaintiff's business, and to pay over such salaries, compensation and other income, if any, to plaintiff.

H. For damages against Ryan with respect to Count I of this complaint in the sum of $500,000.00.

I. For damages against Ryan, Renz and Brooks with respect to Count II of this complaint in the sum of $500,000.00 and for exemplary damages against said defendants with respect to said Count in the sum of $500,000.00.

J. For damages against Hacking and National Bonded Cars of Southern California, Inc., with re-

spect to Count III of this complaint in the sum of $350,000.00.

K. For damages against Hacking and Chambers with respect to Count IV of this complaint in the sum of $350,000.00 and for exemplary damages against said defendants with respect to said Count in the sum of $350,000.00.

L. For damages against all of the defendants herein with respect to Count V of this complaint in the sum of $500,000.00 and for exemplary damages against said defendants with respect to said Count in the sum of $500,000.00.

PHILIP S. EHRLICH,
FELDMAN & O'DONNELL,
JESSE FELDMAN,
MURRY J. WALDMAN,

By /s/ MURRY J. WALDMAN,
Attorneys for Plaintiff.

Duly verified.

EXHIBIT "A"

License and Franchise Agreement

Agreement made in Union, New Jersey, the 12th day of December, 1955, by and between National Bonded Cars, Inc., a New Jersey Corporation having its principal office and place of business at 1965 Morris Avenue in the Township of Union, County

of Union and State of New Jersey (hereinafter called "Licensor"), and Francis B. Ryan (hereinafter called "Licensee").

Witnesseth:

Whereas, Licensor is the owner of certain ideas, forms, plans, system and knowledge for engaging in the business of the inspection of all major mechanical parts of used or new cars and the issuance of an independent Warranty thereof. The performance of such Warranty is insured under a master policy with The Employers' Liability Assurance Corporation, Limited, of 110 Milk Street, Boston, Massachusetts, and will continue to maintain such policy or some substantially similar policy with a recognized Insurance Company for so long as it is necessary in its business, and has developed and practically applied such forms and system of doing business to its inspections, general procedure, repair procedure and the manner of indemnifying and paying all claims, losses or the adjustment and settlement thereof under said Warranty in actual business operation, and

Whereas, the Licensee is desirous of securing a license and franchise to conduct the aforesaid business of the Licensor in the following territory, viz.: Counties attached hereto and made a part of this License and Franchise:

Northerly portion of the State of California, extending southward to, but not including the Coun-

ties of San Luis Obispo, Kern and Inyo, and the northerly part of the State of Nevada, including all counties except the following: Esmeralda, Nye, Lincoln and Clark.

and

Whereas, the Licensor is desirous of aiding the Licensee therein and in providing itself and other Licensees with full protection of its said ideas, forms, plans, system and knowledge of doing business, including the general procedure, method and extent of inspection, method and control of the issuance of Warranties, repair procedure, and the manner of verifying, indemnifying and paying of all claims, losses and insurance as developed, adopted, and carried out by it in the conduct of its said business now and as hereinafter may be modified by it from time to time,

Now, Therefore, it is mutually agreed as follows:

1. Licensor hereby grants an exclusive license to Licensee to adopt and use its aforesaid ideas, forms, plans, system and knowledge for the making of such automobile inspections and the issuance of such Warranties to the purchasers of approved new or used cars within the territory described herein.

2. All business done by the Licensee shall be conducted in its own name as Licensee hereunder, except that it shall have the right to use the name of the Licensor on the door of its office, its stationery and forms, but only to such extent and in such

manner as may be approved from time to time by the Licensor in writing, it being the intent of the Licensor that they be only in such form and manner as will in no way subject the Licensor to any Liability of any kind, nature or description to any third parties with whom Licensee may do business except under the terms of duly signed dealer's contracts with the Licensor and duly issued warranties of the Licensor to the respective holders thereof. All contracts with dealers must be confirmed by the Licensor at its home office in writing before becoming effective.

3. Licensor agrees to make available to Licensee any new ideas, plans, forms, systems, advertising copy and improvements in the method of the conduction of its business that may be developed during the existence of the License and Franchise Agreement and to cause its duly qualified officers and employees at the expense of the Licensee, to consult with the Licensee and advise it from time to time on all matters in regard thereto. Cost therefore to the Licensee shall be limited to out-of-pocket expenses of such officer or employee necessarily expended in connection with such consultation and advice.

4. Licensor agrees to pay to the Licensee Eight Dollars ($8.00) for each car for which Licensee remits to it a fee for the inspection and issuance of a Warranty thereon; Four Dollars ($4.00) for each rejected car for which Licensee remits an inspection Fee; Four Dollars ($4.00) for each rejected car

that is reinspected, approved, and a Warranty issued thereon for which Licensee remits the fee, and Eight Dollars ($8.00) for each car for which Licensee remits to Licensor an Emergency Warranty fee on new or used cars and its inspection report and approval.

Licensor agrees that after Licensee has inspected and remitted fees for five thousand inspections to pay to the Licensee Nine Dollars, ($9.00) for each car for which Licensee remits to it a fee for the inspection and issuance of a Warranty thereon; Four Dollars and Fifty Cents ($4.50) for each rejected car for which Licensee remits an inspection fee; Four Dollars and Fifty Cents ($4.50) for each rejected car that is reinspected, approved, and a Warranty issued thereon for which Licensee remits the fee, and Nine Dollars ($9.00) for each car for which Licensee remits to Licensor an Emergency Warranty fee on new or used cars and its inspection report and approval.

5. Licensee agrees as follows:

a. To merchandise the inspection and warranty of National Bonded Cars, Inc., at a price per vehicle prescribed by it.

b. To remit to the Licensor immediately on collection, at its home office, the total amount of all monies collected by it for each inspection made hereunder, both when the inspected automobile is rejected for warranty, and when the inspected vehicle is approved and a warranty duly issued.

c. To use only the form of Dealer's Agreement prescribed and authorized by National Bonded Cars, Inc., and to limit its use strictly to new car dealers.

d. To require that all checks for payments made upon inspection, at the time the issuance of a Warranty by a dealer to the purchaser of a car thereby covered and at the time of the issuance of emergency Warranties be made out to National Bonded Cars, Inc., and remitted to it forthwith by the Licensee.

e. To keep true and correct books and accounts in accordance with the bookkeeping system recommended by the Licensor. The Licensee shall pay the entire cost of establishing, maintaining, and auditing the books and records as required hereunder. These books and records shall be available for inspection by the Licensor or its duly authorized representative during all regular business hours.

f. To provide an appropriate office for the conducting of such business in said territory.

g. To employ such salesmen, inspectors, office help, and other employees as may be necessary to carry out its aforesaid business within said territory and to maintain in form satisfactory to the Licensor adequate unemployment and liability insurance covering such employees and any automobiles that may operate in connection with their business activities, in form and amount satisfactory to the Licensor and with the insurance of appro-

priate Certificates of Insurance to the Licensor for its proper protection in connection therewith.

h. To maintain a separate local bank account in the name of the Licensee for the sole purpose of the conduct of its business as Licensee and Franchise holder which shall be opened at the time Licensee commences business. A statement of this account shall be made available to the Licensor whenever demanded by it in writing, and all statements of this account covering the entire period of its existence shall likewise be available to the Licensor at any time upon demand.

i. To devote his full time and attention and best efforts exclusively to the conduct of said business under this License and Franchise Agreement and to use his best efforts to procure conscientious inspectors, salesmen and other employees, the names, addresses and qualifications of which shall be sent to Licensor immediately upon their hiring, and further agrees that he will discharge any and all employees designated by the Licensor as failing to come up to the standard required by the Licensor.

j. That he shall be solely responsible for all costs and expenses in connection with the establishment and maintenance of the said business and for taxes and levies of any and all kinds in connection therewith, and the income to the Licensee arising therefrom, and that Licensor shall not be liable for any such expenses, taxes, levies, or disbursements paid or incurred in connection with the establishment

and maintenance of said business, and Licensee agrees to indemnify and hold Licensor harmless from any and all claims, law suits, demands and other causes of action that may arise or be asserted against Licensor by reason of the establishment and maintenance of the aforesaid business by the Licensee, or by reason of Licensee's use of the name of Licensor and to reimburse it for all counsel fees and expenses in defending the same, and it is understood and agreed that in granting this license, Licensor does not authorize or empower Licensee to use its name in any other capacity than as provided hereunder, nor to enter into any contracts, leases, or execute any other documents or instruments in writing in its name, or in any way as agent for it or to hold himself out as a general or special agent, or partner of Licensor in any way except as hereinbefore specifically set forth and provided.

k. The Licensee, or its partners, or its executive officers or principal stockholders will not have any interest, financial or otherwise in any business which is in any way competitive with that of the Licensor throughout the term of the existence of this Franchise and License Agreement and for the period of three (3) years after any termination thereof, nor shall he or any of them take employment of any kind in any such competing business during the said period of three (3) years beyond the expiration of this License and Franchise Agreement.

l. Licensee shall conduct its business in the gen-

eral manner provided therefore under this License and Franchise Agreement and shall make no material deviation therefrom without the prior written consent of the Licensor. Any question arising in connection therewith shall rest in the sole and absolute discretion of the Licensor and any violation thereof shall at its option constitute a breach of this agreement.

m. All advertising to be placed by Licensee in newspapers, periodicals or signs for production by radio and television, and all forms and other printed matter used in connection with the conduct of such business shall be subject to the written approval of Licensor as to content, form, quality of the printing and the paper proposed to be used before being used.

6. The term of the License granted hereunder is for one year commencing on the date of the execution hereunder unless such term shall be sooner terminated in accordance with the provisions hereof, and shall be renewed automatically thereafter from year to year unless the Licensee herein shall give written notice to the Licensor of his desire to terminate this agreement not later than sixty (60) days prior to the end of the then current term.

7. The Licensee agrees to comply in all respects with all laws, statutes, rules and regulations, Federal, State, County and Municipal, and of all other governmental authorities that may be necessary for or incident to the conduct of its business as such

Licensee and Franchise holder under the terms of this agreement at its own cost and expense, and upon demand, to furnish appropriate evidence of such compliance to the Licensor; and the Licensee hereby agrees to indemnify the Licensor and to hold it harmless against any possible claims against it, and to reimburse any expenses it may have including legal fees for any failure of the Licensee to fully comply therewith.

8. Licensee recognizes that the branch office to be opened by Licensee hereunder will be a component of many such branch offices operated by various Licensees throughout the country, and to insure substantial uniformity throughout such branch offices, Licensee agrees to conform to any and all instructions of Licensor regarding basic policies pertaining to the conduct of such business by Licensee hereunder, which policy shall include but not be limited to advertising, management, sales policies, methods of inspection and operating procedures and techniques.

9. If Licensee shall fail to perform, keep and observe any covenant, term or condition of this agreement, or fails for a reasonable period of time to maintain the volume of business that is done by other Licensees in comparable areas, a default hereunder shall be deemed to exist. This License and Franchise is granted subject to the specific condition that if a default hereunder on the part of Licensee is not cured within thirty days after written notice of default delivered by Licensor to

Licensee, the License and Franchise herein granted may be forthwith terminated by Licensor but without prejudice to any other rights or remedies Licensor may have.

10. No car over five years old (five model years) shall be inspected for Warranty. Licensor shall have the right at any and all times to reinspect any cars inspected hereunder to see that its inspection standards and requirements are being maintained. Three such reinspection visits per year shall be paid for by Licensee, at cost, which cost shall be actual salary plus expenses, not to exceed $200 per visit. Should the Warranty loss ratio on cars approved by Licensee exceed Sixty per cent (60%), Licensor may cancel this franchise forthwith.

11. In the event that Licensee shall file a voluntary or involuntary petition in bankruptcy, or a petition for relief under any Federal or State bankruptcy or insolvency laws, this agreement shall forthwith terminate upon the date of the filing thereof.

In the event that a petition for relief under any Federal or State Bankruptcy or insolvency laws shall be filed against Licensee and any and all such proceedings are not completed and discharged within thirty (30) days, or in the event of the involuntary dissolution of Licensee, this agreement shall forthwith terminate.

12. Licensee shall not sell, transfer, assign, sublicense, mortgage or pledge this agreement or any

rights or privileges accruing hereunder, to any person, firm or corporation without the written consent of Licensor first had and obtained and in the event the Licensee shall be a Corporation there shall be no sale or transfer of stock to others without the written consent of the Licensor.

13. Licensee agrees to maintain adequate Workmen's Compensation and Employers' Liability Insurance, and to make any and all requisite withholding, social security payments and/or taxes in accordance with the laws of the United States and the territories named herein.

14. This agreement shall not be deemed to create any relationship of agency, partnership or joint venture between the parties hereto. No employee engaged by Licensee shall, under any circumstances, be deemed to be an employee of Licensor, and all employees engaged by Licensee shall be so notified.

15. Any notice required to be given pursuant hereto shall be mailed to:

Licensor: National Bonded Cars, Inc., 1965 Morris Avenue, Union, New Jersey.

Licensee: Address given as soon as office is established.

16. The failure of the Licensor to insist, in any one or more instances, upon strict performance of any one or more of the items and conditions of this agreement, or to exercise any rights hereunder, shall

not be construed as a waiver thereof, but the same shall continue and remain in full force and effect.

17. This agreement contains the entire agreement between Licensor and Licensee, and any agreements hereafter made shall be ineffective to change, modify or discharge it in whole or in part unless such agreement is in writing and signed by the party against whom enforcement of the change, modification or discharge is sought.

18. This agreement shall be construed interpreted in accordance with the provisions of the laws of the State of New Jersey.

In Witness Whereof, the undersigned have executed this agreement the day and year first above written.

NATIONAL BONDED CARS, INC.,

By /s/ HARRY S. CAMPBELL, President;

By /s/ WESLEY MILBURN, Treasurer;

By /s/ FRANCIS B. RYAN, Licensee.

In the Presence of:

/s/ P. B. THOMPSON,

/s/ FRED W. FLAHERTY.

EXHIBIT "B"

Area Franchise Agreement

Agreement made in Springfield, New Jersey, the 7th day of February, 1957, by and between National Bonded Cars, Inc., a New Jersey Corporation having its principal office and place of business at 120 Morris Avenue in the Township of Springfield, County of Union and State of New Jersey (hereinafter called "Company"), and Francis B. Ryan (hereinafter called "Area Representative").

Witnesseth:

Whereas, the Company is the owner of certain ideas, forms, plans, system and knowledge for engaging in the business of the inspection of all major mechanical parts of used or new cars and the issuance of a warranty in connection therewith, and has developed and practically applied such forms and system of doing business, as qualified automotive experts, to its inspections, general procedure, repair procedure and the manner of verifying and paying the costs of repairs covered by said warranty in actual business operation, and

Whereas, the Area Representative is desirous of securing an area representative agreement to conduct the aforesaid business of the Company in the following territory viz.: Counties attached to and made a part of this area franchise agreement:

Northerly portion of the State of California, extending southward to, but not including the Coun-

ties of San Luis Obispo, Kern and Inyo, and the northerly part of the State of Nevada, including all counties except the following: Esmeralda, Nye, Lincoln and Clark.

and

Whereas, the Company is desirous of aiding the Area Representative therein, and in providing itself and other Area Representatives with its said ideas, forms, plans, system and knowledge of doing business, including the general procedure, method and extent of inspection method and control of the issuance of warranties, repair procedure, and the manner of verifying and paying of all costs of repairs covered by our warranty, as developed, adopted, and carried out by it in the conduct of its said business, now and as hereinafter may be modified by it from time to time.

Now, Therefore, it is mutually agreed as follows:

1. Company hereby grants an exclusive area representative agreement to Area Representative to use on behalf of the Company its aforesaid ideas, forms, plans, system and knowledge for the making of such automobile inspections and the issuance of the certification and warranty incidental thereto on approved new or used cars within the territory described herein.

2. All business done by the Area Representative shall be conducted for its own account as Area Representative hereunder, except as set forth in

paragraph 1, above, and it shall use the name of the Company on the door of its office, its stationery and forms, but only to such extent and in such manner as may be approved from time to time by the Company in writing, it being the intent of the Company that they be only in such form and manner as will in no way subject the Company to any liability of any kind, nature or description to any third parties with whom Area Representative may do business except as herein specifically authorized and under the terms of duly signed dealer's contracts with the Company, inspections made thereunder and duly issued warranties of the Company to the respective holders thereof. All contracts with dealers must be confirmed by the Company at its home office in writing before becoming effective.

3. Area Representative agrees to accept any and all new ideas, plans, forms, systems, advertising copy, and improvements or changes in the method of the conduction of such business as may be developed hereunder and to change or modify its operation in accordance with any and all instructions immediately upon receipt thereof from the Company.

4. It is clearly understood that Area Representative is to pay all expenses in connection with the operation of its office in the territory, and all expenses in connection with the obligations assumed by Area Representative under this agreement out of the pay received by it from the Company as follows:

The Company agrees to pay to the Area Representative Nine ($9.00) Dollars for each approved vehicle, for which the Company has received its prescribed fee and an inspection report and approval; ($4.50) for each rejected car for which the Company has received its prescribed fee and inspection report and rejection; and ($4.50) for each rejected car that is reinspected and approved for which the Company has received its prescribed fee and reinspection report and approval.

5. Area Representative agrees as follows:

a. To merchandise the inspection service and warranty of National Bonded Cars, Inc., at a price per vehicle prescribed by it.

b. To remit to the Company immediately on collection, at its home office, the total amount of all monies collected by it for each inspection made hereunder, both when the inspected automobile is rejected for warranty, and when the inspected vehicle is approved and a warranty duly issued.

c. To use only the form of Dealer's Agreement prescribed and authorized by National Bonded Cars, Inc., and to limit its use strictly to new car dealers.

d. To require that all checks for payments made upon inspection, and at the time of issuance of a warranty by a dealer to the purchaser of a car be made out to National Bonded Cars, Inc., and remitted to it forthwith by the Area Representative.

e. To keep true and correct books and accounts in accordance with the bookkeeping system recom-

mended by the Company. The Area Representative shall pay the entire cost of establishing, maintaining, and auditing the books and records as required hereunder. These books and records shall be available for inspection by the Company or its duly authorized representative during all regular business hours.

f. To provide an appropriate office for the conducting of such business in said territory.

g. To employ such salesmen, inspectors, office help, and other employees as may be necessary to carry out its aforesaid business within said territory and to maintain in form satisfactory to the Company adequate unemployment and liability insurance covering such employees and any automobiles that may operate in connection with their business activities, in form and amount satisfactory to the Company and with the issuance of appropriate Certificates of Insurance to the Company for its proper protection in connection therewith. Particular care shall be used in the selection and hiring of inspectors, the employment of whom must be previously approved in writing by the Company and whose continued employment as such inspectors must at all times remain completely satisfactory to the Company.

h. To maintain a separate local bank account in the name of the Area Representative for the sole purpose of the conduct of its business as Area Representative which shall be opened at the time Area Representative commences business. A statement of this account shall be made available to the Company whenever demanded by it in writing, and

all statements of this account covering the entire period of its existence shall likewise be available to the Company at any time upon demand.

i. To devote its full time and attention and best efforts exclusively to the conduct of said business under this area representative agreement and to use its best efforts to procure conscientious inspectors, salesmen and other employees, the names, addresses and qualifications of which shall be sent to Company immediately upon their hiring, and further agrees that he will discharge any and all employees designated by the Company as failing to come up to the standard required by the Company. Particular care will be used in the supervision of the activities of all inspectors, who will act as agents of the Company in making inspections; in checking automobiles when repairs have been requested; and in issuing drafts on the Company in payment of repair bills for approved repairs. No inspectors will be hired until approved by the Company and fully trained by it for the exercise of their duties, and in such exercise will adhere rigidly to the requirements of the inspection manual and any other instructions, directions, or requirements of the Company concerning method and extent of their activities.

j. That as Area Representative it shall be solely responsible for all costs and expenses in connection with the establishment and maintenance of the said business, and for taxes and levies of any and all kinds in connection therewith, and the income of the Area Representative arising therefrom, and that

Company shall not be liable for any such expenses, taxes, levies or disbursements paid or incurred in connection with the establishment and maintenance of said business, and Area Representative agrees to indemnify and hold Company harmless from any and all claims, lawsuits, demands and other causes of action that may arise or be asserted against Company by reason of the establishment and maintenance of the aforesaid business by the Area Representative or by reason of Area Representative's use of the name of Company and to reimburse it for all counsel fees and expenses in defending the same, and it is understood and agreed that in granting this Agreement, Company does not authorize or empower Area Representative to use its name in any other capacity than as provided hereunder, nor to enter into contracts, leases, or execute any other documents or instruments in writing in its name, or in any way as agent for it or to hold himself out as a general or special agent, or partner of Company, in any way except as herein specifically set forth and provided.

k. The Area Representative, or its partners, or its executive officers or principal stockholders will not have any interest, financial or otherwise in any business which is in any way competitive with that of the Company throughout the term of the existence of this Area Representative Agreement and for the period of three (3) years after any termination thereof, nor shall it or any one connected with it take employment of any kind in any such competing business during the same period of three (3) years

beyond the expiration of this Area Representative Agreement.

l. Area Representative shall conduct its business in the manner provided hereunder, and shall make no material deviation therefrom without the prior written consent of the Company. Any question arising in connection therewith shall rest in the sole and absolute discretion of the Company, and any violation thereof shall at its option constitute a breach of this agreement.

m. All advertising to be placed by Area Representative in newspapers, periodicals or signs and for production by radio and television, and all forms and other printed matter used in connection with the conduct of such business shall be subject to the written approval of Company as to content, form, quality of the printing and the paper proposed to be used before being used.

6. The term of this agreement is for one year commencing on the date of the execution hereof, unless such term shall be sooner terminated in accordance with the provisions hereof, and shall be renewed automatically thereafter from year to year so long as Area Representative performs to the satisfaction of the Company hereunder.

7. The Area Representative agrees to comply in all respects with all laws, rules and regulations, Federal, State, County and Municipal, and of all other governmental authorities that may be necessary for or incident to the conduct of its business as such Area Representative under the terms of this agree-

ment at its own cost and expense, and upon demand, to furnish appropriate evidence of such compliance to the Company; and the Area Representative hereby agrees to indemnify the Company and to hold it harmless against any possible claims against it, and to reimburse any expenses it may have including legal fees for any failure of the Area Representative to fully comply therewith.

8. Area Representative recognizes that the branch office to be opened by Area Representative hereunder will be a component of many such branch offices operated by various Area Representatives throughout the country, and to insure substantial uniformity throughout such branch offices, Area Representative agrees to conform to any and all instructions of Company regarding basic policies pertaining to the conduct of such business by Area Representative hereunder, which policy shall include but not be limited to advertising, management, sales policies, methods of inspection and operating procedures and techniques.

9. If Area Representative shall fail to perform, keep and observe any covenant, term or condition of this agreement, or fails for a reasonable period of time to maintain the volume of business that is done by other Area Representatives in comparable areas, a default hereunder shall be deemed to exist. This agreement is made subject to the specific condition that if a default hereunder on the part of Area Representative is not cured within thirty days after written notice of default delivered by Com-

pany to Area Representative, the agreement herein granted may be forthwith terminated by Company, but without prejudice to any other rights or remedies Company may have.

10. No car over five years old (five model years) shall be inspected for warranty. Area Representative will carefully supervise the work of all inspectors for the Company for and on its behalf to see that the requirements of the inspection manual, and training and direction of the Company covering such inspections be fully and carefully carried out by them in the making of all inspections for the Company. Company shall have the right at any and all times to re-inspect any cars inspected hereunder to see that its inspection standards and requirements are being maintained. Regular periodic reinspections will be made by the chief inspectors from our home office at the Company's expense. Should the cost of approved repairs under the warranty on cars approved by inspectors supervised by Area Representative remain excessive after warning, in the sole and absolute discretion of the Company, the Company may cancel this agreement forthwith.

11. In the event that Area Representative shall file a voluntary or involuntary petition in bankruptcy, or a petition for relief under any Federal or State bankruptcy or insolvency laws, this agreement shall forthwith terminate upon the date of the filing thereof.

In the event that a petition for relief under any Federal or State Bankruptcy or insolvency laws

shall be filed against Area Representative and any and all such proceedings are not completed and discharged within thirty (30) days, or in the event of the involuntary dissolution of Area Representative, this agreement shall forthwith terminate.

12. Area Representative shall not sell, transfer, assign, mortgage or pledge this agreement or any rights or privileges accruing hereunder, to any person, firm or corporation without the written consent of Company first had and obtained and in the event the Area Representative shall be a Corporation there shall be no sale or transfer of stock to others without the written consent of the Company.

13. Area Representative agrees to provide and pay for adequate Workmen's Compensation and Employers' Liability Insurance, and to make any and all requisite withholding, social security payments and/or taxes in accordance with the laws of the United States and the territories named herein.

14. Area Representative agrees to pay for the training of its inspectors either in the field or at the home office. Such payment shall be limited to out of pocket and travel expenses, plus $25.00 per day in the field, chargeable against payments to be made to Area Representative hereunder.

15. Time is of the essence of this Area Representative Agreement and the Area Representative agrees to have an office organized and in operation within thirty (30) days from the date of this agreement.

16. Any notice required to be given pursuant thereto shall be mailed to

Company: National Bonded Cars, Inc., 120 Morris Avenue, Springfield, New Jersey.

Area Representative: Francis B. Ryan, 2446 Van Ness Ave., San Francisco, California.

17. The failure of the Company to insist, in any one or more instances, upon strict performance of any one or more of the terms and conditions of this agreement, or to exercise any rights hereunder, shall not be construed as a waiver thereof, but the same shall continue and remain in full force and effect.

18. This agreement contains the entire agreement between Company and Area Representative, and any agreements hereafter made shall be ineffective to change, modify or discharge it in whole or in part unless such agreement is in writing and signed by the party against whom enforcement of the change, modification or discharge is sought.

19. This agreement shall be construed and interpreted in accordance with the provisions of the laws of the State of New Jersey.

In Witness Whereof, the undersigned have executed this Agreement the day and year first above written.

NATIONAL BONDED CARS, INC.,

By /s/ HARRY S. CAMPBELL,
President;

By /s/ WESLEY MILBURN,
Treasurer;

By /s/ FRANCIS B. RYAN,
Area Representative.

In the Presence of:

/s/ FRED W. FLAHERTY.

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EXHIBIT "C"

License and Franchise Agreement

Agreement made in Union, New Jersey, the 12th day of December, 1955, by and between National Bonded Cars, Inc., a New Jersey Corporation having its principal office and place of business at 1965 Morris Avenue in the Township of Union, County of Union and State of New Jersey (hereinafter called "Licensor"), and Eugene B. O'Brien and A. E. Hacking, Jr. (hereinafter called "Licensee").

Witnesseth:

Whereas, Licensor is the owner of certain ideas, forms, plans, system and knowledge for engaging in the business of the inspection of all major mechanical parts of used or new cars and the issuance of an independent Warranty thereof. The performance of such Warranty is insured under a master policy with The Employers' Liability Assurance Corporation, Limited of 110 Milk Street, Boston, Massachusetts, and will continue to maintain such policy or some substantially similar policy with a recognized Insur-

ance Company for so long as it is necessary in its business, and has developed and practically applied such forms and system of doing business to its inspections, general procedure, repair procedure and the manner of indemnifying and paying all claims, losses or the adjustment and settlement thereof under said Warranty in actual business operation, and

Whereas, the Licensee is desirous of securing a license and franchise to conduct the aforesaid business of the Licensor in the following territory viz.: Counties attached hereto and made a part of this License and Franchise:

Southerly portion of the State of California, which will extend northward to include the counties of San Luis Obispo, Kern and Inyo. In addition it shall include the following counties in the State of Nevada: Esmeralda, Nye, Lincoln and Clark.

and

Whereas, the Licensor is desirous of aiding the Licensee therein and in providing itself and other Licensees with full protection of its said ideas, forms, plans, system and knowledge of doing business, including the general procedure, method and extent of inspection, method and control of the issuance of Warranties, repair procedure, and the manner of verifying, indemnifying and paying of all claims, losses and insurance as developed, adopted, and carried out by it in the conduct of its said busi-

ness now and as hereinafter may be modified by it from time to time,

Now Therefore, it is mutually agreed as follows:

1. Licensor hereby grants an exclusive license to Licensee to adopt and use its aforesaid ideas, forms, plans, system and knowledge for the making of such automobile inspections and the issuance of such Warranties to the purchasers of approved new or used cars within the territory described herein.

2. All business done by the Licensee shall be conducted in its own name as Licensee hereunder, except that it shall have the right to use the name of the Licensor on the door of its office, its stationery and forms, but only to such extent and in such manner as may be approved from time to time by the Licensor in writing, it being the intent of the Licensor that they be only in such form and manner as will in no way subject the Licensor to any Liability of any kind, nature or description to any third parties with whom Licensee may do business except under the terms of duly signed dealer's contracts with the Licensor and duly issued warranties of the Licensor to the respective holders thereof. All contracts with dealers must be confirmed by the Licensor at its home office in writing before becoming effective.

3. Licensor agrees to make available to Licensee any new ideas, plans, forms, systems, advertising copy and improvements in the method of the conduction of its business that may be developed during

the existence of the License and Franchise Agreement and to cause its duly qualified officers and employees at the expense of the Licensee, to consult with the Licensee and advise it from time to time on all matters in regard thereto. Cost therefore to the Licensee shall be limited to out of pocket expenses of such officer or employee necessarily expended in connection with such consultation and advice.

4. Licensor agrees to pay to the Licensee Eight Dollars ($8.00) for each car for which Licensee remits to it a fee for the inspection and issuance of a Warranty thereon; Four Dollars ($4.00) for each rejected car for which Licensee remits an inspection fee; Four Dollars ($4.00) for each rejected car that is reinspected, approved, and a Warranty issued thereon for which Licensee remits the fee, and Eight Dollars ($8.00) for each car for which Licensee remits to Licensor an Emegency Warranty fee on new or used cars and its inspection report and approval.

Licensor agrees that after Licensee has inspected and remitted fees for five thousand inspections to pay to the Licensee Nine Dollars ($9.00) for each car for which Licensee remits to it a fee for the inspection and issuance of a Warranty thereon; Four Dollars and fifty cents ($4.50) for each rejected car for which Licensee remits an inspection fee; Four Dollars and fifty cents ($4.50) for each rejected car that is reinspected, approved, and a Warranty issued thereon for which Licensee remits the

fee, and Nine Dollars ($9.00) for each car for which Licensee remits to Licensor an Emergency Warranty fee on new or used cars and its inspection report and approval.

5. Licensee agrees as follows:

a. To merchandise the inspection and warranty of National Bonded Cars, Inc., at a price per vehicle prescribed by it.

b. To remit to the Licensor immediately on collection, at its home office, the total amount of all monies collected by it for each inspection made hereunder, both when the inspected automobile is rejected for warranty, and when the inspected vehicle is approved and a warranty duly issued.

c. To use only the form of Dealer's Agreement prescribed and authorized by National Bonded Cars, Inc., and to limit its use strictly to new car dealers.

d. To require that all checks for payments made upon inspection, at the time the issuance of a Warranty by a dealer to the purchaser of a car thereby covered and at the time of the issuance of emergency Warranties be made out to National Bonded Cars, Inc., and remitted to it forthwith by the Licensee.

e. To keep true and correct books and accounts in accordance with the bookkeeping system recommended by the Licensor. The Licensee shall pay the entire cost of establishing, maintaining, and auditing

the books and records as required hereunder. These books and records shall be available for inspection by the Licensor or its duly authorized representative during all regular business hours.

f. To provide an appropriate office for the conducting of such business in said territory.

g. To employ such salesmen, inspectors, office help, and other employees as may be necessary to carry out its aforesaid business within said territory and to maintain in form satisfactory to the Licensor adequate unemployment and liability insurance covering such employees and any automobiles that may operate in connection with their business activities, in form and amount satisfactory to the Licensor and with the insurance of appropriate Certificates of Insurance to the Licensor for its proper protection in connection therewith.

h. To maintain a separate local bank account in the name of the Licensee for the sole purpose of the conduct of its business as Licensee and Franchise holder which shall be opened at the time Licensee commences business. A statement of this account shall be made available to the Licensor whenever demanded by it in writing, and all statements of this account covering the entire period of its existence shall likewise be available to the Licensor at any time upon demand.

i. To devote his full time and attention and best efforts exclusively to the conduct of said business under this License and Franchise Agreement and to

use his best efforts to procure conscientious inspectors, salesmen and other employees, the names, addresses and qualifications of which shall be sent to Licensor immediately upon their hiring, and further agrees that he will discharge any and all employees designated by the Licensor as failing to come up to the standard required by the Licensor.

j. That he shall be solely responsible for all costs and expenses in connection with the establishment and maintenance of the said business and for taxes and levies of any and all kinds in connection therewith, and the income to the Licensee arising therefrom, and that Licensor shall not be liable for any such expenses, taxes, levies, or disbursements paid or incurred in connection with the establishment and maintenance of said business, and Licensee agrees to indemnify and hold Licensor harmless from any and all claims, lawsuits, demands and other causes of action that may arise or be asserted against Licensor by reason of the establishment and maintenance of the aforesaid business by the Licensee, or by reason of Licensee's use of the name of Licensor and to reimburse it for all counsel fees and expenses in defending the same, and it is understood and agreed that in granting this license, Licensor does not authorize or empower Licensee to use its name in any other capacity than as provided hereunder, nor to enter into any contracts, leases, or execute any other documents or instruments in writing in its name, or in any way as agent for it or to hold himself out as a general or special

agent, or partner of Licensor in any way except as hereinbefore specifically set forth and provided.

k. The Licensee, or its partners, or its executive officers or principal stockholders will not have any interest, financial or otherwise in any business which is in any way competitive with that of the Licensor throughout the term of the existence of this Franchise and License Agreement and for the period of three (3) years after any termination thereof, nor shall he or any of them take employment of any kind in any such competing business during the said period of three (3) years beyond the expiration of this License and Franchise Agreement.

l. Licensee shall conduct its business in the general manner provided therefore under this License and Franchise Agreement and shall make no material deviation therefrom without the prior written consent of the Licensor. Any question arising in connection therewith shall rest in the sole and absolute discretion of the Licensor and any violation thereof shall at its option constitute a breach of this agreement.

m. All advertising to be placed by Licensee in newspapers, periodicals or signs for production by radio and television, and all forms and other printed matter used in connection with the conduct of such business shall be subject to the written approval of Licensor as to content, form, quality of the printing and the paper proposed to be used before being used.

6. The term of the License granted hereunder is for one year commencing on the date of the execution hereunder unless such term shall be sooner terminated in accordance with the provisions hereof, and shall be renewed automatically thereafter from year to year unless the Licensee herein shall give written notice to the Licensor of his desire to terminate this agreement not later than sixty (60) days prior to the end of the then current term.

7. The Licensee agrees to comply in all respects with all laws, statutes, rules and regulations, Federal, State, County and Municipal, and of all other governmental authorities that may be necessary for or incident to the conduct of its business as such Licensee and Franchise holder under the terms of this agreement at its own cost and expense, and upon demand, to furnish appropriate evidence of such compliance to the Licensor; and the Licensee hereby agrees to idemnify the Licensor and to hold it harmless against any possible claims against it, and to reimburse any expenses it may have including legal fees for any failure of the Licensee to fully comply therewith.

8. Licensee recognizes that the branch office to be opened by Licensee hereunder will be a component of many such branch offices operated by various Licensees throughout the country, and to insure substantial uniformity throughout such branch offices, Licensee agrees to conform to any and all instructions of Licensor regarding basic policies pertaining to the conduct of such business by Licensee

hereunder, which policy shall include but not be limited to advertising, management, sales policies, methods of inspection and operating procedures and techniques.

9. If Licensee shall fail to perform, keep and observe any covenant, term or condition of this agreement, or fails for a reasonable period of time to maintain the volume of business that is done by other Licensees in comparable areas, a default hereunder shall be deemed to exist. This License and Franchise is granted subject to the specific condition that if a default hereunder on the part of Licensee is not cured within thirty days after written notice of default delivered by Licensor to Licensee, the Licensee and Franchise herein granted may be forthwith terminated by Licensor but without prejudice to any other rights or remedies Licensor may have.

10. No car over five years old (five model years) shall be inspected for Warranty. Licensor shall have the right at any and all times to re-inspect any cars inspected hereunder to see that its inspection standards and requirements are being maintained. Three such re-inspection visits per year shall be paid for by Licensee, at cost, which cost shall be actual salary plus expenses, not to exceed $200 per visit. Should the Warranty loss ratio on cars approved by Licensee exceed Sixty percent (60%), Licensor may cancel this franchise forthwith.

11. In the event that Licensee shall file a voluntary or involuntary petition in bankruptcy, or a

petition for relief under any Federal or State bankruptcy or insolvency laws, this agreement shall forthwith terminate upon the date of the filing thereof.

In the event that a petition for relief under any Federal or State Bankruptcy or insolvency laws shall be filed against Licensee and any and all such proceedings are not completed and discharged within thirty (30) days, or in the event of the involuntary dissolution of Licensee, this agreement shall forthwith terminate.

12. Licensee shall not sell, transfer, assign, sublicense, mortgage or pledge this agreement or any rights or privileges accruing hereunder, to any person, firm or corporation without the written consent of Licensor first had and obtained and in the event the Licensee shall be a Corporation there shall be no sale or transfer of stock to others without the written consent of the Licensor.

13. Licensee agrees to maintain adequate Workmen's Compensation and Employers' Liability Insurance, and to make any and all requisite withholding, social security payments and/or taxes in accordance with the laws of the United States and the territories named herein.

14. This agreement shall not be deemed to create any relationship of agency, partnership or joint venture between the parties hereto. No employee engaged by Licensee shall, under any circumstances,

be deemed to be an employee of Licensor, and all employees engaged by Licensee shall be so notified.

15. Any notice required to be given pursuant hereto shall be mailed to

Licensor: National Bonded Cars Inc., 1965 Morris Avenue, Union, New Jersey.

Licensee: Address given as soon as office is established.

16. The failure of the Licensor to insist, in any one or more instances, upon strict performance of any one or more of the terms and conditions of this agreement, or to exercise any rights hereunder, shall not be construed as a waiver thereof, but the same shall continue and remain in full force and effect.

17. This agreement contains the entire agreement between Licensor and Licensee, and any agreements hereafter made shall be ineffective to change, modify or discharge it in whole or in part unless such agreement is in writing and signed by the party against whom enforcement of the change, modification or discharge is sought.

18. This agreement shall be construed interpreted in accordance with the provisions of the laws of the State of New Jersey.

In Witness Whereof, the undersigned have executed this agreement the day and year first above written.

In the presence of:

NATIONAL BONDED CARS INC.,

By /s/ HARRY S. CAMPBELL,
President;

By /s/ C. WESLEY MILBURN,
Treasurer;

By /s/ EUGENE B. O'BRIEN,

/s/ A. E. HACKING, JR.,
Licensees.

/s/ P. B. THOMPSON.

## EXHIBIT "D"

### Area Franchise Agreement

Agreement made in Springfield, New Jersey, the 8th day of October, 1956, by and between National Bonded Cars, Inc., a New Jersey Corporation having its principal office and place of business at 120 Morris Avenue in the Township of Springfield, County of Union and State of New Jersey, (hereinafter called "Company") and Albert E. Hacking (hereinafter called "Area Representative").

Witnesseth:

Whereas, the Company is the owner of certain ideas, forms, plans, system and knowledge for en-

gaging in the business of the inspection of all major mechanical parts of used or new cars and the issuance of a warranty in connection therewith, and has developed and practically applied such forms and system of doing business, as qualified automotive experts, to its inspections, general procedure, repair procedure and the manner of verifying and paying the costs of repairs covered by said warranty in actual business operation, and

Whereas, the Area Representative is desirous of securing an area representative agreement to conduct the aforesaid business of the Company in the following territory viz.: The following counties attached to and made a part of this area franchise agreement:

Southern California—District #1

That portion of the State of California which includes the following counties: Santa Barbara, Ventura, Los Angeles, San Luis Obispo, Kern, Inyo.

and

Whereas, the Company is desirous of aiding the Area Representative therein, and in providing itself and other Area Representatives with its said ideas, forms, plans, system and knowledge of doing business, including the general procedure, method and extent of inspection method and control of the issuance of warranties, repair procedure, and the manner of verifying and paying of all costs of repairs covered by our warranty, as developed, adopted,

and carried out by it in the conduct of its said business, now and as hereinafter may be modified by it from time to time.

Now, Therefore, it is mutually agreed as follows:

1. Company hereby grants an exclusive area representative agreement to Area Representative to use on behalf of the Company its aforesaid ideas, forms, plans, system and knowledge for the making of such automobile inspections and the issuance of the certification and warranty incidental thereto on approved new or used cars within the territory described herein.

2. All business done by the Area Representative shall be conducted for its own account as Area Representative hereunder, except as set forth in paragraph 1, above, and it shall use the name of the Company on the door of its office, its stationery and forms, but only to such extent and in such manner as may be approved from time to time by the Company in writing, it being the intent of the Company that they be only in such form and manner as will in no way subject the Company to any liability of any kind, nature, or description to any third parties with whom Area Representative may do business except as herein specifically authorized and under the terms of duly signed dealer's contracts with the Company, inspections made thereunder and duly issued warranties of the Company to the respective holders thereof. All contracts with dealers must be

confirmed by the Company at its home office in writing before becoming effective.

3. Area Representative agrees to accept any and all new ideas, plans, forms, systems, advertising copy, and improvements or changes in the method of the conduction of such business as may be developed hereunder and to change or modify its operation in accordance with any and all instructions immediately upon receipt thereof from the Company.

4. It is clearly understood that Area Representative is to pay all expenses in connection with the operation of its office in the territory, and all expenses in connection with the obligations assumed by Area Representative under this agreement out of the pay received by it from the Company as follows:

The Company agrees to pay to the Area Representative Nine ($9.00) Dollars for each approved vehicle, for which the Company has received its prescribed fee and an inspection report and approval; Four Dollars and Fifty Cents ($4.50) for each rejected car for which the Company has received its prescribed fee and inspection report and rejection; and Four Dollars and Fifty Cents ($4.50) for each rejected car that is reinspected and approved for which the Company has received its prescribed fee and reinspection report and approval.

5. Area Representative agrees as follows:

a. To merchandise the inspection service and warranty of National Bonded Cars, Inc., at a price per vehicle prescribed by it.

b. To remit to the Company immediately on collection, at its home office, the total amount of all monies collected by it for each inspection made hereunder, both when the inspected automobile is rejected for warranty, and when the inspected vehicle is approved and a warranty duly issued.

c. To use only the form of Dealer's Agreement prescribed and authorized by National Bonded Cars, Inc., and to limit its use strictly to new car dealers.

d. To require that all checks for payments made upon inspection, and at the time of issuance of a warranty by a dealer to the purchaser of a car be made out to National Bonded Cars, Inc., and remitted to it forthwith by the Area Representative.

e. To keep true and correct books and accounts in accordance with the bookkeeping system recommended by the Company. The Area Representative shall pay the entire cost of establishing, maintaining, and auditing the books and records as required hereunder. These books and records shall be available for inspection by the Company for its duly authorized representative during all regular business hours.

f. To provide an appropriate office for the conducting of such business in said territory.

g. To employ such salesmen, inspectors, office help, and other employees as may be necessary to carry out its aforesaid business within said territory and to maintain in form satisfactory to the Company adequate unemployment and liability insurance covering such employees and any automobiles that may operate in connection with their business activities, in form and amount satisfactory to the Company and with the issuance of appropriate Certificates of Insurance to the Company for its proper protection in connection therewith. Particular care shall be used in the selection and hiring of inspectors, the employment of whom must be previously approved in writing by the Company and whose continued employment as such inspectors must at all times remain completely satisfactory to the Company.

h. To maintain a separate local bank account in the name of the Area Representative for the sole purpose of the conduct of its business as Area Representative which shall be opened at the time Area Representative commences business. A statement of this account shall be made available to the Company whenever demanded by it in writing, and all statements of this account covering the entire period of its existence shall likewise be available to the Company at any time upon demand.

i. To devote its full time and attention and best efforts exclusively to the conduct of said business under this area representative agreement and to use its best efforts to procure conscientious inspec-

tors, salesmen and other employees, the names, addresses and qualifications of which shall be sent to Company immediately upon their hiring, and further agrees that he will discharge any and all employees designated by the Company as failing to come up to the standard required by the Company. Particular care will be used in the supervision of the activities of all inspectors, who will act as agents of the Company in making inspections; in checking automobiles when repairs have been requested; and in issuing drafts on the Company in payment of repair bills for approved repairs. No inspectors will be hired until approved by the Company and fully trained by it for the exercise of their duties, and in such exercise will adhere rigidly to the requirements of the inspection manual and any other instructions, directions, or requirements of the Company concerning method and extent of their activities.

j. That as Area Representative it shall be solely responsible for all costs and expenses in connection with the establishment and maintenance of the said business, and for taxes and levies of any and all kinds in connection therewith, and the income of the Area Representative arising therefrom, and that Company shall not be liable for any such expenses, taxes, levies or disbursements paid or incurred in connection with the establishment and maintenance of said business, and Area Representative agrees to indemnify and hold Company harmless from any and all claims, law suits, demands and other causes

of action that may arise or be asserted against Company by reason of the establishment and maintenance of the aforesaid business by the Area Representative or by reason of Area Representative's use of the name of the Company and to reimburse it for all counsel fees and expenses in defending the same, and it is understood and agreed that in granting this Agreement, Company does not authorize or empower Area Representative to use its name in any other capacity than as provided hereunder, nor to enter into contracts, leases, or execute any other documents or instruments in writing in its name, or in any way as agent for it or to hold himself out as a general or special agent, or partner of Company, in any way except as herein specifically set forth and provided.

k. The Area Representative, or its partners, or its executive officers or principal stockholders will not have any interest, financial or otherwise in any business which is in any way competitive with that of the Company throughout the term of the existence of this Area Representative Agreement and for the period of three (3) years after any termination thereof, nor shall it or any one connected with it take employment of any kind in any such competing business during the same period of three (3) years beyond the expiration of this Area Representative Agreement.

l. Area Representative shall conduct its business in the manner provided hereunder, and shall make no material deviation therefrom without the prior

written consent of the Company. Any question arising in connection therewith shall rest in the sole and absolute discretion of the Company, and any violation thereof shall at its option constitute a breach of this agreement.

m. All advertising to be placed by Area Representative in newspapers, periodicals or signs and for production by radio and television, and all forms and other printed matter used in connection with the conduct of such business shall be subject to the written approval of Company as to content, form, quality of the printing and the paper proposed to be used before being used.

6. The term of this agreement is for one year commencing on the date of the execution hereof, unless such term shall be sooner terminated in accordance with the provisions hereof, and shall be renewed automatically thereafter from year to year so long as Area Representative performs to the satisfaction of the Company hereunder.

7. The Area Representative agrees to comply in all respects with all laws, statutes, rules and regulations, Federal, State, County and Municipal, and of all other governmental authorities that may be necessary for or incident to the conduct of its business as such Area Representative under the terms of this agreement at its own cost and expense, and upon demand, to furnish appropriate evidence of such compliance to the Company; and the Area Representative hereby agrees to indemnify the Company

and to hold it harmless against any possible claims against it, and to reimburse any expenses it may have including legal fees for any failure of the Area Representative to fully comply therewith.

8. Area Representative recognizes that the branch office to be opened by Area Representative hereunder will be a component of many such branch offices operated by various Area Representatives throughout the country, and to insure substantial uniformity throughout such branch offices, Area Representative agrees to conform to any and all instructions of Company regarding basic policies pertaining to the conduct of such business by Area Representative hereunder, which policy shall include but not be limited to advertising, management, sales policies, methods of inspection and operating procedures and techniques.

9. If Area Representative shall fail to perform, keep and observe any covenant, term or condition of this agreement, or fails for a reasonable period of time to maintain the volume of business that is done by other Area Representatives in comparable areas, a default hereunder shall be deemed to exist. This agreement is made subject to the specific condition that if a default hereunder on the part of Area Representative is not cured within thirty days after written notice of default delivered by Company to Area Representative, the agreement herein granted may be forthwith terminated by Company, but without prejudice to any other rights or remedies Company may have.

10. No car over five years old (five model years) shall be inspected for warranty. Area Representative will carefully supervise the work of all inspectors for the Company for and on its behalf to see that the requirements of the inspection manual, and training and direction of the Company covering such inspections be fully and carefully carried out by them in the making of all inspections for the Company. Company shall have the right at any and all times to reinspect any cars inspected hereunder to see that its inspection standards and requirements are being maintained. Regular periodic reinspections will be made by the chief inspectors from our home office at the Company's expense. Should the cost of approved repairs under the warranty on cars approved by inspectors supervised by Area Representative remain excessive after warning, in the sole and absolute discretion of the Company, the Company may cancel this agreement forthwith.

11. In the event that Area Representative shall file a voluntary or involuntary petition in bankruptcy, or a petition for relief under any Federal or State bankruptcy or insolvency laws, this agreement shall forthwith terminate upon the date of the filing thereof.

In the event that a petition for relief under any Federal or State Bankruptcy or insolvency laws shall be filed against Area Representative and any and all such proceedings are not completed and discharged within thirty (30) days, or in the event of

the involuntary dissolution of Area Representative, this agreement shall forthwith terminate.

12. Area Representative shall not sell, transfer, assign, mortgage or pledge this agreement or any rights or privileges accruing hereunder, to any person, firm or corporation without the written consent of Company first had and obtained and in the event the Area Representative shall be a Corporation there shall be no sale or transfer of stock to others without the written consent of the Company.

13. Area Representative agrees to provide and pay for adequate Workmen's Compensation and Employers' Liability Insurance, and to make any and all requisite withholding, social security payments and/or taxes in accordance with the laws of the United States and the territories named herein.

14. Area Representative agrees to pay for the training of its inspectors either in the field or at the home office. Such payment shall be limited to out of pocket and travel expenses, plus $25.00 per day in the field, chargeable against payments to be made to Area Representative hereunder.

15. Time is of the essence of this Area Representative Agreement and the Area Representative agrees to have an office organized and in operation within thirty (30) days from the date of this agreement.

16. Any notice required to be given pursuant thereto shall be mailed to:

Company: National Bonded Cars, Inc., 120 Morris Avenue, Springfield, New Jersey.

Area Representative: Albert E. Hacking, 8224 Long Beach Blvd., Southgate, California.

17. The failure of the Company to insist, in any one or more instances, upon strict performance of any one or more of the terms and conditions of this agreement, or to exercise any rights hereunder, shall not be construed as a waiver thereof, but the same shall continue and remain in full force and effect.

18. This agreement contains the entire agreement between Company and Area Representative, and any agreements hereafter made shall be ineffective to change, modify or discharge it in whole or in part unless such agreement is in writing and signed by the party against whom enforcement of the change, modification or discharge is sought.

19. This agreement shall be construed and interpreted in accordance with the provisions of the laws of the State of New Jersey.

In Witness Whereof, the undersigned have executed this Agreement the day and year first above written.

NATIONAL BONDED CARS, INC.,

By /s/ HARRY S. CAMPBELL,
President;

By /s/ C. WESLEY MILBURN,
Treasurer;

By /s/ ALBERT E. HACKING,
Area Representative.

In the presence of:

/s/ P. B. THOMPSON.

[Endorsed]: Filed September 4, 1958.

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[Title of District Court and Cause.]

## NOTICE OF MOTION FOR PRELIMINARY INJUNCTION

Please Take Notice that, upon the verified complaint in the above-entitled action and the affidavit of Geoffrey K. Clowes, a copy of which is hereto annexed, before the Master Calendar Judge, in the Post Office Building in the City and County of San Francisco, State of California, on the 22nd day of September, 1958, at the opening of the Court on that day, or as soon thereafter as Counsel can be heard, a motion will be made for a preliminary injunction against the defendants herein in accordance with the prayer of said complaint, and for such other or further relief in the premises as to the Court may seem just and proper.

Dated: September 4, 1958.

PHILIP S. EHRLICH,
FELDMAN & O'DONNELL,
JESSE FELDMAN,
MURRY J. WALDMAN,

By /s/ MURRY J. WALDMAN,
Attorneys for Plaintiff.

[Endorsed]: Filed September 4, 1958.

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[Title of District Court and Cause.]

## MOTION FOR PRELIMINARY INJUNCTION

Plaintiff moves the Court to grant a preliminary injunction pending the final determination of this action and until the further order of this court against:

1. Defendants Francis B. Ryan, Donald Brooks, A. E. Hacking, James Chambers, Truman Renz, National Bonded Cars of Southern California, Inc., Nation-Wide Automobile Dealers Insurance Agency and Nation-Wide Automobile Mechanical Insurance Agency, Inc., and each of the officers, directors and employees of said National Bonded Cars of Southern California, Inc., Nation-Wide Automobile Dealers Insurance Agency, Inc., and said Nation-Wide Automobile Mechanical Insurance Agency,

Inc., restraining them and each of them from engaging in the business of selling mechanical automobile warranties or in any similar business competitive with plaintiff's business,

2. Defendants Balboa Insurance Co. and The Central Agency of San Francisco, Incorporated, and each of their officers, directors and employees, restraining them and each of them from insuring mechanical automobile warranties or any similar guarantees issued by or through said Nation-Wide Automobile Dealers Insurance Agency and said Nation-Wide Automobile Mechanical Insurance Agency, Inc.,

3. Defendant Francis B. Ryan restraining him from acting or purporting to act as plaintiff's area representative in the States of California and Nevada, and

4. Defendants A. E. Hacking and National Bonded Cars of Southern California, Inc., restraining them and each of them from acting or purporting to act as plaintiff's area representatives in the States of California and Nevada,

on the grounds that unless restrained by this court said defendants will commit the acts referred to, which will result in irreparable injury, loss and damage to plaintiff during the pendency of this action, as more fully appears from the verified complaint herein and the affidavit of Geoffrey K. Clowes attached hereto and made a part hereof.

Dated: September 4, 1958.

PHILIP S. EHRLICH,
FELDMAN & O'DONNELL,
JESSE FELDMAN,
MURRY J. WALDMAN,

By /s/ MURRY J. WALDMAN,
Attorneys for Plaintiff.

[Endorsed]: Filed September 4, 1958.

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[Title of District Court and Cause.]

## AFFIDAVIT OF GEOFFREY K. CLOWES IN SUPPORT OF PRELIMINARY INJUNCTION

State of California,
City and County of San Francisco—ss.

Geoffrey K. Clowes, being duly sworn, deposes and says:

1. I am a Vice President of National Bonded Cars, Inc., the plaintiff in the above entitled action and I make this affidavit in support of plaintiff's motion for a preliminary injunction herein.

2. Hereinafter in this affidavit the various defendants herein shall be referred to by the same names as they are referred to in the complaint.

3. Early in 1956, having entered into an area representative agreement with plaintiff covering the territory of Northern California and Nevada, Ryan came to San Francisco, took up residence in the

Richelieu Hotel and commenced doing business from that address. Shortly after his arrival he rented desk space in the office of Central at 2456 Van Ness Avenue in San Francisco. With the assistance of the home office of plaintiff, Ryan was successful in establishing a chain of automobile dealers throughout his territory, who used plaintiff's warranty program. As the business grew, it became necessary for Ryan to employ both office and outside help, and among those so employed were Renz and Brooks as salesmen.

4. Early in 1956, Hacking and a Mr. Eugene B. O'Brien started operations in Southern California and Nevada as plaintiff's area representatives in that territory pursuant to written agreement with plaintiff. They established their office at 8224 Long Beach Blvd., Southgate, California. Subsequently, Hacking and O'Brien had a disagreement and, with the consent of plaintiff, in October, 1956, their territory was divided into two areas. Hacking then entered into a new agreement with plaintiff whereby he became plaintiff's area representative in the following counties in California: Santa Barbara, Ventura, Los Angeles, San Luis Obispo, Kern and Inyo. On or about November 21, 1957, Hacking assigned his area representation agreement with plaintiff to National Bonded Cars of Southern California, Inc., which thereafter technically acted as plaintiff's area representative in the territory covered by said agreement. Hacking continued, however, to operate plaintiff's business in said territory since National

Bonded Cars of Southern California, Inc., was wholly controlled by him and Chambers whom Hacking employed to assist him. During 1956 and 1957 Hacking was successful in establishing plaintiff's program with a large number of dealers in his territory.

5. Late in 1957, Ryan and Hacking began exploring the possibility of setting up their own organizations, independent of plaintiff, to engage in the same business as plaintiff in competition with plaintiff. In order to do this, it was necessary to find an insurance carrier to underwrite the performance of the mechanical automobile warranties to be issued by the new organizations proposed to be formed by Ryan and Hacking. Accordingly, Lynch, an insurance broker in San Francisco, was requested to negotiate with a number of insurance companies with this end in view. On January 10, 1958, Lynch arranged a meeting in San Francisco with a Mr. A. Morganstern, Chairman of the Board of Resolute Insurance Company of Hartford, Connecticut. At this meeting, in addition to Mr. Morganstern, there were present Mr. Jack Kiehl, resident Vice President of Resolute Insurance Company in California, Ryan and Renz. Nothing came of this meeting and, thereafter, Lynch, on behalf of Ryan and Hacking, approached other insurance companies, including Balboa, Balfour-Guthrie, Argonaut and Premier. During these negotiations, Ryan, Hacking and Lynch were closely assisted by Robertson, one of the principals of Central, the general agents for Balboa.

6. As part of these negotiations it was necessary to provide statistics to insurance companies relating to the loss ratio experience in plaintiff's business and this highly confidential information was given by Ryan and Hacking. In this regard, and at the direct request of a Mr. Devany, Executive Vice President of Balboa, Robertson made a detailed and exhaustive examination of all of Ryan's and Hacking's records in the operation of plaintiff's business in both Northern and Southern California.

7. Early in 1958, an agreement was finally entered into whereby Balboa, through Central, agreed to insure the mechanical automobile warranties to be issued by the new organizations to be formed by Ryan and Hacking. At about the same time, Ryan, Renz and Brooks created NADIA for the purpose of engaging in the business of issuing mechanical automobile warranties in Northern California and Nevada, and Hacking and Chambers created NAMIA for the same purpose in Southern California and Nevada. Ryan's name was intentionally concealed as a principal in NADIA and Hacking's name was likewise concealed as a principal in NAMIA.

8. At all times hereinbefore mentioned, Robertson, Lynch, Balboa, Central, NADIA and NAMIA were fully aware of the terms and conditions of the area representative agreements which both Ryan and Hacking had with plaintiff.

9. In May, 1958, NADIA and NAMIA were ready to and did commence operations. NADIA's

offices were the same as Central's in San Francisco, and NAMIA's offices were at plaintiff's office in Southgate.

10. At this time, Central sent out a letter to all of its dealers in Northern California announcing the availability of the new mechanical auto warranty program and advising those interested to contact NADIA. Following this, an immediate drive was made by Ryan's outside representatives, both salesmen and inspectors, who were ostensibly associated with plaintiff's business, to switch plaintiff's dealers and accounts from plaintiff's program to the NADIA program. In this drive considerable assistance was lent by Central's sales organization. Ryan's plan was to convert as many of the dealers as possible outside the County of San Francisco. He deliberately avoided trying to switch San Francisco dealers in order to avoid the possibility of anyone from plaintiff's home office visiting San Francisco and detecting the subterfuge. During the months of May, June and July, 1958, all of Ryan's personnel was used to work on both plaintiff's and NADIA's business with emphasis on the latter. It is known that many of the dealers who switched from plaintiff to NADIA were led to believe that NADIA's plan was plaintiff's new insurance program.

That this is so is evidenced by the fact that at least one dealer actually sent to plaintiff's office in San Francisco five separate checks, payable to plaintiff's order, for premiums on NADIA warranties

sold through such dealer. A copy of one of such checks and the NADIA voucher attached thereto is annexed hereto as Exhibit I. NADIA attempted to foster this belief by using the same inspection reports as are used by plaintiff.

11. Hacking followed the same general pattern to switch dealers from plaintiff to NAMIA in Southern California as was followed by Ryan for NADIA in Northern California. Plaintiff's inspection reports have been used by NAMIA and a conscious effort has been made to induce dealers in that territory to believe that NAMIA's program is plaintiff's new insurance plan. Hacking's fraudulent disloyalty to plaintiff is accentuated by the fact that during the period from January 20, 1958, to June 13, 1958, he was, in addition to being plaintiff's area representative in Southern California, also a salaried employee of plaintiff. During said period, he was specifically employed by plaintiff at a salary of $192.32 per week plus expenses to do field work in the conduct of plaintiff's business in the Southern part of the United States. During said period, in which Hacking created and actually started the operation of NAMIA, Hacking received the sum of $6,546.47 from plaintiff as salary and expenses for his services.

12. The devastating effect on plaintiff's business resulting from the entry of NADIA and NAMIA into the automobile warranty business is graphically illustrated by the following chart which shows the number of cars inspected for warranty

under plaintiff's program in Ryan's and Hacking's territories during the months of January through July, 1958:

| Territory | Jan. | Feb. | March | April | May | June | July |
|---|---|---|---|---|---|---|---|
| Ryan | 966 | 811 | 897 | 865 | 804 | 345 | 142 |
| Hacking | 698 | 585 | 636 | 480 | 450 | 247 | 271 |

The marked drop in inspections in the months of June and July can only have been caused by the aforementioned fraudulent misconduct of Ryan and Hacking and their confederates.

13. Since the end of November, 1957, Ryan, to use his words, has been causing plaintiff's warranty certificates to be issued on "anything that rolls." On the other hand, since the creation of NADIA, he has stressed the importance of rigid inspections given to cars submitted for warranty under the NADIA plan. Hacking, like Ryan, has admitted that since November, 1957, "anything with wheels on" has been bonded for warranty by plaintiff. However, the most rigid inspection standards have been maintained for cars submitted for warranty to NAMIA. As a result of Ryan's and Hacking's indiscriminate acceptance of automobiles for bonding by plaintiff, plaintiff has suffered and will continue to suffer excessive losses from claims.

14. I did not become associated with plaintiff until about July 28, 1958. Before that time, and, in fact, early in January, 1958, I met with Ryan and others at Bardelli's Restaurant in San Francisco. At that meeting Ryan stated that he was in

the process of negotiating with a number of insurance companies for the purpose of starting his own program entirely independent of plaintiff's business. He stressed the fact that he was going to try and get as many of plaintiff's area representatives as possible to do the same thing. He also stated that Hacking was helping him and that they were working on a partnership deal together for the whole State of California. He went on further to say that he had an appointment with Hacking in Los Angeles on the following day for the purpose of discussing their proposed new program with an insurance company.

15. I met again with Ryan and others in May, 1958, in San Francisco. At that time Ryan informed me that he had entered into a partnership with Renz and Brooks in which he, Ryan, had a 62% interest, Renz a 28% interest and Brooks a 10% interest, but that only Brooks' name would appear as proprietor of the business, said business being NADIA. At the same time he stated that he and his personnel were switching as many of plaintiff's dealers as possible over to NADIA and that they were working closely in conjunction with Central. He also stated that his new organization was set up so that it would be impossible for anyone to detect Ryan's association with it.

16. At the end of June, 1958, I again met with Ryan and others at the Newarker Restaurant, Newark Airport, Newark, New Jersey. At this meeting, Ryan openly admitted his association with

NADIA, his partnership with Renz and Brooks and the fact that he had already converted most of plaintiff's dealers over to his new operation. He stated that for all intents and purposes plaintiff's business on the West Coast was dead. He admitted that he had had many conversations with many of plaintiff's other area representatives and had encouraged them to start their own business and to divorce themselves from plaintiff.

17. Finally, at a meeting on July 14, 1958, at plaintiff's home office in Springfield, New Jersey, Ryan repeated the foregoing statements to Mr. Carl Baer and Mr. Raymond Biersach, vice presidents of plaintiff. This was the first time that plaintiff acquired concrete evidence of Ryan's and Hacking's activities, in violation of their area representative agreements.

18. On July 28, 1958, I met with Ryan, Robertson and others in San Francisco. During the course of our conversation, Robertson admitted to having negotiated the deal between Balboa and NADIA and NAMIA which he had been able to do after having access to and making an exhaustive investigation of plaintiff's confidential records in Ryan's possession. He further stated that all of this information had been submitted for examination to the aforementioned Mr. Devany of Balboa. He also stated that Central's sales force of eight men were actively engaged in soliciting business for NADIA and that he had complete control over all of the dealers who had been using plaintiff's program.

19. At a meeting between the aforementioned Mr. Devany and James E. Smith, president of plaintiff, in Los Angeles on August 5, 1958, Mr. Devany admitted to Mr. Smith that he had personally met Ryan, and had examined plaintiff's loss ratio statistics which Robertson had obtained for him and that on the basis of these he had approved the underwriting of NADIA's and NAMIA's programs by Balboa.

20. Other evidences of Hacking's and Ryan's malicious and wilful misconduct during the period of their representation of plaintiff have come to my attention. I have been advised that kickbacks from repair shops who were employed to do plaintiff's business in Hacking's territory have been demanded and received and that fictitious claims from said territories have been presented to and paid by plaintiff. Plaintiff is now investigating these matters and criminal action may be indicated. Furthermore, an employee of Hacking's has informed me that he recently discovered claims on warranties issued by plaintiff in excess of $50,000.00 lying unprocessed in Hacking's desk. In addition, as recently as August 4, 1958, I have had individuals call plaintiff's office in San Francisco and state that they were interested in purchasing a warranty from plaintiff. The young lady in plaintiff's office who answered the telephone tried to persuade the callers to purchase a NADIA warranty.

21. The damage done to plaintiff's reputation and good will with its dealer accounts and custom-

ers, as well as with its area representatives, on the West Coast can probably never be undone. The economic losses suffered by plaintiff in said area as a result of the malicious and wilful misconduct of the foregoing defendants is enormous. Every day that NADIA and NAMIA continue to engage in the business of selling mechanical automobile warranties by the use of plaintiff's confidential trade secrets and fraudulent misrepresentation serves to further confound and confuse the relationship between plaintiff and NADIA and NAMIA and further encourage plaintiff's dealer accounts and customers who have not already switched to NADIA's and NAMIA's plan to make such a switch. Unless a preliminary injunction is granted herein, plaintiff's entire business on the West Coast will be so irreparably damaged and irretrievably lost as to make the further operation of its business in said area a complete impossibility.

/s/ GEOFFREY K. CLOWES.

Subscribed and sworn to before me this 2nd day of September, 1958.

[Seal] /s/ HALLIE KELLER,
Notary Public in and for Said City and County, State of California.

My commission expires 11-17-61.

EXHIBIT NO. 1

CAMERON-STEWART PONTIAC-CADILLAC, INC.
CHICO, CALIFORNIA

No. 1565

August 26 19 58 80-1220 1211

PAY ★★★★35 DOLS 00 CTS $ 35.00

TO THE ORDER OF

National Bonded Cars, Inc.
110 Sutter St.
San Francisco, 4, Calif.
Att: Mr. Hal Loomis

CHICO OFFICE
CROCKER-ANGLO NATIONAL BANK
CHICO, CALIFORNIA

CAMERON-STEWART PONTIAC-CADILLAC, INC.
BY
BY

EMPLOYEE'S NAME

CAMERON-STEWART PONTIAC-CADILLAC, INC. CHICO, CALIFORNIA

| PAY PERIOD | GROSS EARNINGS | DEDUCTIONS | | | | | | | | BALANCE PAID |
|---|---|---|---|---|---|---|---|---|---|---|
| | | WITH TAX | F.O.A.B. | S.D.I. | V.P. | G. HOSP. | A/C | ADVANCES | TOTAL | |
| | | | | | | | | | | |

EMPLOYEE: THIS IS A STATEMENT OF YOUR EARNINGS AND DEDUCTIONS FOR THE PERIOD INDICATED. KEEP THIS FOR YOUR PERMANENT RECORD.

| DATE | STATEMENT | | INVOICE | DISCOUNT | NET |
|---|---|---|---|---|---|
| | Bond #4442, 55 Buick, Reg. 7B2045945<br>stk 8-127B, Harvey Trucks | 631 | | | 35.00 |

DETACH AND RETAIN THIS STATEMENT

ACCEPTANCE: ATTACHED CHECK SHALL CONSTITUTE APPROVAL AND RATIFICATION OF ALL ITEMS AS STATED ON ☐ ACCOUNT

OWNED OF 1955 Buick 7B2045945
Year Make Serial No. Mileage

Cameron Stewart
Chico Calif
R F Stewart

8-127A
Dealer's Stock Number

48 Del
Body Type Model Year
Date of Purchase

No. 4442

HARVEY TRUCKS
Harvey Trucks
1647 BROADWAY
CHICO CALIF

NATIONWIDE AUTO DEALERS INSURANCE AGENCY
2446 Van Ness Avenue
San Francisco, Calif. Phone ORdway 3-1500

Endorsed: Filed September 4, 1958. Exhibit I

[Title of District Court and Cause.]

## ANSWER OF DEFENDANT DONALD D. LYNCH

Now Comes Donald D. Lynch, sued herein as Donald D. Lynch, and in answer to the complaint on file herein admits, denies and alleges as follows:

I.

As to the paragraphs of said complaint numbered 1 through 25 they appear to refer to other parties to the action and not to this defendant. This defendant has no knowledge, information and belief sufficient to answer the same and therefore denies each and every one of the allegations thereof.

II.

In answer to paragraph 26 of said complaint which is a part of Count V thereof this defendant denies each and every allegation contained therein.

III.

In answer to paragraph 27 of said complaint contained in Count V thereof this defendant denies the allegations thereof, and particularly denies that he conspired with the other defendants or anyone else in relation to plaintiff's business or at all.

IV.

In answer to paragraph 28 of said complaint this defendant denies inducing anybody to disclose any trade secrets to anybody and in this connection this

defendant denies that there were any trade secrets on the ground that he has no knowledge, information or belief sufficient to discuss them.

Wherefor, defendant Donald B. Lynch prays that plaintiff take nothing by virtue of his complaint and that this defendant be dismissed with his costs.

/s/ E. WALTER LYNCH,
Attorney for Defendant
Donald D. Lynch.

Duly verified.

[Endorsed]: Filed September 25, 1958.

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[Title of District Court and Cause.]

## ANSWER TO COMPLAINT AND COUNTERCLAIM

Comes now the defendant, A. E. Hacking, and answers plaintiff's Complaint as follows:

Answering Count III of plaintiff's Complaint, defendant alleges as follows:

I.

Defendant denies each and every allegation, and the whole thereof, of Paragraph 17, both generally and specifically, except that defendant admits that the franchise agreement referred to in said Paragraph was assigned to the corporation.

II.

Defendant denies each and every allegation, and

the whole thereof, of Paragraphs 19 and 20 of said Count, both generally and specifically.

Answering Count IV of plaintiff's Complaint, defendant alleges as follows:

I.

Defendant reincorporates his denials to Paragraph 19 of Count III, to the same effect as though here fully set forth at length.

II.

Defendant denies each and every allegation, and the whole thereof, of Paragraphs 22, 23, 24 of Count IV, both generally and specifically, except that defendant admits that defendant, James Chambers, was in his employ in 1957.

Answering Count V of plaintiff's Complaint, defendant alleges as follows:

I.

Answering Paragraph 25, defendant reincorporates his allegations and denials to Paragraphs 1 through 24 of the Complaint, to the same effect as though here fully set forth at length.

II.

Defendant does not have sufficient information or belief to enable him to answer the allegations contained in Paragraph 26 and basing his denial on that ground, denies each and every allegation

therein contained, both generally and specifically; defendant denies that there were any trade secrets imparted to him from plaintiff, and denies that he disclosed any confidential information to any person whatsoever other than those in his employ or in the employ of plaintiff.

III.

Answering Paragraphs 27, 28 and 29 of plaintiff's Complaint, defendant denies each and every allegation, and the whole thereof, therein contained, generally and specifically, insofar as said allegations pertain to said defendant.

Counterclaim

Count One

I.

On May 23, 1958, defendant and Donald J. Rackemann entered into an agreement in writing under which defendant agreed to sell and said Rackemann agreed to purchase three thousand (3,000) shares of stock, standing in the name of this defendant, of National Bonded Cars of Southern California, Inc., a California corporation, being all of the issued and outstanding shares of stock of said corporation, for a consideration of $10,000.00. In addition, said Rackemann agreed to assume liability for and indemnify this defendant against all outstanding debts and obligations of said corporation as of May 23, 1958, and thereafter.

II.

Defendant has fully performed all of the terms and conditions and covenants in said agreement on his part to be performed.

III.

Because of plaintiffs' solicitation, counsel and advice to said Rackemann, the latter has failed and refused to perform any of the terms, conditions and covenants in said agreement on his part to be performed.

IV.

Due to plaintiffs' solicitation, counsel and advice to said Rackemann, as aforesaid, defendant has been damaged in the sum of $10,000.00, as the purchase price of said stock, and in the further sum of $5,000.00, represented by debts and obligations of said corporation assumed by Rackemann in said written agreement, all of which said Rackemann has failed and refused to pay, on plaintiffs' advice, as aforesaid, although requested so to do by defendant.

Count Two

I.

On January 20, 1958, plaintiff employed this defendant for a period of one year at an annual salary of $10,000.00, plus expenses. Said employment agreement was put in writing in the form of a letter dated January 20, 1958, addressed to this defendant and executed by plaintiff, a copy of which letter is attached hereto as Exhibit "A" and by

this reference incorporated herein and made a part hereof.

II.

That defendant entered upon the performance of said employment agreement and fully performed all of the terms and conditions thereof on his part to be performed until prevented therefrom by plaintiff on June 13, 1958.

III.

That on June 13, 1958, plaintiff discharged this defendant, without cause, and failed and refused to pay him any further compensation or expenses.

IV.

That defendant has been unable, since said date of June 13, 1958, to obtain other similar employment.

V.

That prior to said wrongful discharge of defendant from his said employment, as aforesaid, plaintiff had paid to defendant under said employment agreement compensation at the rate of $10,000.00 a year for the period from January 20, 1958, to June 31, 1958, in the approximate sum of $3,956.00, and that the balance in the approximate sum of $6,044.00 is now due, owing and unpaid from plaintiff to defendant, as compensation; that defendant incurred business expenses under said employment agreement for which plaintiff has failed and refused to reimburse defendant, in the approximate sum of $200.00, which sum is also due, owing and unpaid from plaintiff to this defendant.

Wherefore, defendant demands:

(1) That the relief demanded in plaintiff's complaint be denied as to this defendant;

(2) That the Court discharge this defendant from all liability in the premises;

(3) That the Court award judgment in favor of this defendant and against plaintiff, on the First Count of this defendant's Counterclaim, in the sum of $15,000.00, plus interest at the legal rate from May 23, 1958;

(4) That the Court award judgment in favor of this defendant and against plaintiff, on the Second Count of this defendant's Counterclaim, in the sum of $6,244.00, plus interest at the legal rate from June 13, 1958.

(5) That the Court award to this defendant his costs of suit and attorney's fees; and

(6) For such other and further relief as to the Court seems just and proper.

/s/ JOHN D. GRAY,
Attorney for Defendant
A. E. Hacking.

EXHIBIT A

National Bonded Cars, Inc.
Executive Offices: 120 Morris Avenue, Springfield, N. J., DRexel 6-4900

January 20, 1958.

Mr. A. E. Hacking,
National Bonded Cars of Southern California,
8224 Long Beach Boulevard,
South Gate, California.

Dear Mr. Hacking:

In accordance with our discussions and your discussions with Mr. Pitt, National Bonded Cars, Inc., hereby agrees to put you on the payroll at an annual sum of $10,000.00. You will, of course, be reimbursed for all expenses and be given a $60.00 depreciation car allowance, and a gas credit card.

In addition to the salary sum, you will receive a bonus payable at the end of each sixty days. This bonus is to be calculated upon the increased business received from the areas in which you are working, or have worked and will be as a result of your own efforts. This will be calculated at the sum of 15% of the increased monies retained from the net amount of money received in handling by National Bonded Cars, and is not in anyway to be calculated on the $9.00 fee which is the cost of running the operation, and also is not in anyway to be calculated on any monies received and reserved for insurance.

It is understood that this arrangement is in order for Mr. Hacking to prove his ability and worth to National Bonded Cars, and at the end of the six months period, he will meet with Mr. Milburn and Mr. Pitt to determine a permanent connection and position with the company, and to further discuss his interests in his current franchise in Southern California.

The bonus arrangement is figured for a period of one year from the date that he has worked in an area.

Very truly yours,

NATIONAL BONDED CARS, INC.,

/s/ WESS,
C. WESLEY MILBURN,
President.

CWM:h

Duly verified.

Affidavit of Service by Mail attached.

[Endorsed]: Filed October 1, 1958.

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[Title of District Court and Cause.]

## AFFIDAVIT OF C. J. SCHNABEL

State of California,
City and County of San Francisco—ss.

C. J. Schnabel, being first duly sworn, deposes and says:

That I am connected with the Voss Motor Company, automobile dealers with offices at 132 Monterey Street, Salinas, California.

I was first associated with National Bonded Cars, and sold their used car warranty as general manager of Charles French Motors in Oakland beginning in 1955.

After a satisfactory relationship with National Bonded Cars at Charles French Motors, I purchased an interest in Voss Motor Company of Salinas and immediately arranged to sell the automobile warranty to the customers of my new company.

These automobile warranties were a problem to finance. Because it could not be listed separately on the customer's contract, the bank financing a sale hesitated to include it in the price of the automobile. The bank was hesitant because of their rulings on the auto value amounts they will finance in ratio to the commercially recognized value of the automobile. Therefore, I was often confronted with collecting for the auto warranty in cash or giving the warranty away to the customer—either method being quite a hardship for the Voss Motor Company.

During the later part of the year 1957 I was informed that the Attorney General of the State of California had ruled that the auto warranty companies would necessarily have to conform to the insurance laws of the State of California rather

than operating strictly as service companies. I then contacted National Bonded Cars and asked them if I was proceeding legally by selling their bond, in view of this ruling of the Attorney General. They replied that their home office had assured them that any continuance of the sale of their bond was legal and to pass this information on to their automobile dealers.

Neither I nor anyone connected with my company was ever contacted by the Balboa Insurance Company or Central Agency, Inc., acting in behalf of Balboa. On the contrary, and acting for Voss Motor Company, I personally contacted the Balboa Insurance Company for advice on the aforesaid matter, particularly in light of the Attorney General's opinion, and motivated by my long association with said Balboa Insurance Company. I was then told that the major insurance companies in the auto finance field of California, namely, Balboa and Premier, were developing a plan to help their automobile dealers who had accounts with them to give their customers an auto mechanical insurance which would definitely conform with all the insurance statutes of the State of California.

Since April of 1958 to the present time our claims submitted to National Bonded Cars, Inc., have been unduly delayed. A minimum of $1,200.00 is now unpaid, dating back to April, 1958. These claims have been approved and we have been told that they are in the eastern office of National Bonded Cars, Inc., for check issuance. We have had to advance all the

monies for these claims and this is one of the reasons we decided to dispense with National Bonded Cars' services.

We have been selling Balboa Mechanical Insurance and have found it very satisfactory in light of claims services, claims payments and the general benefits we are giving to the customers. In addition, when we began selling the Balboa policy it was $5.00 less in cost than the National Bonded Car warranty. My company is relieved to know that we are doing business with an established company like the Balboa Insurance Company with whom we have had excellent, satisfactory relations for at least seven years. My company decided to continue their long business association with said Balboa Insurance Company.

/s/ C. J. SCHNABEL.

Subscribed and sworn to before me this 29th day of September, 1958.

[Seal] /s/ FRANCES E. WALDION,
Notary Public in and for the City and County of San Francisco, State of California.

Affidavit of Service by Mail attached.

[Endorsed]: Filed October 1, 1958.

[Title of District Court and Cause.]

## AFFIDAVIT OF L. C. FOX

State of California,
City and County of San Francisco—ss.

L. C. Fox, being first duly sworn, deposes and says:

That I am President of Lou Fox, Inc., which company has, for many years last past, and now is doing business as an automobile dealer with offices at 2555 Shattuck Avenue, Berkeley, California.

Our company had done business with the National Bonded Cars, Inc., for a considerable period of time. However, we were not satisfied with our association due to what we considered unreasonable delay on their part in paying certain claims.

When the Balboa Insurance Company entered the one year New and Used Car Guarantee field we became very interested. We had enjoyed several years of fine relationships with the Balboa Insurance Company and at Central Agency, acting in behalf of said Balboa and we were pleased to direct our business to them. This was particularly true in view of the fact that their type of coverage was, in our opinion, complying in all respects with the insurance laws of the State of California.

/s/ L. C. FOX.

Subscribed and sworn to before me this 29th day of September, 1958.

[Seal] /s/ FRANCES E. WALDION,
Notary Public in and for the City and County of San Francisco, State of California.

Affidavit of Service by Mail attached.

[Endorsed]: Filed October 1, 1958.

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[Title of District Court and Cause.]

## AFFIDAVIT OF GEORGE KUHN

State of California,
City and County of San Francisco—ss.

George Kuhn, being first duly sworn, deposes and says:

That I am a used car manager connected with the Spencer Buick, Inc., automobile dealers with offices at 18th Avenue and Taraval, San Francisco, California. My concern changed its mechanical warranty insurance business from National Bonded Cars, Inc., to N.A.D.I.A. for the reason of the excessive price increase by National Bonded Cars.

The foregoing change of business was voluntary on my company's part and a matter of my company's own choice.

There was no pressure brought to bear or acts or conduct by Mr. Ryan or anyone connected with

N.A.D.I.A. which had any bearing on the above change of business.

/s/ GEORGE F. KUHN.

Subscribed and sworn to before me this 29th day of September, 1958.

[Seal] /s/ FRANCES E. WALDION,
Notary Public in and for the City and County of San Francisco, State of California.

Affidavit of Service by Mail attached.

[Endorsed]: Filed October 1, 1958.

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[Title of District Court and Cause.]

## AFFIDAVIT OF VERNE F. GARRETT

State of California,
City and County of San Francisco—ss.

Verne F. Garrett, being first duly sworn, deposes and says:

That he is and for some time has been the General Manager of Crown Motor Sales, automobile dealers, with business offices at 780 High Street, Palo Alto, California.

Due to recent publicity regarding the various warranty companies issuing certificates for mechanical failure on new and used cars, I decided

that Balboa Insurance Company rendered the most likely mechanical insurance protection to ourselves and our customers.

Because of doing business with Balboa for approximately ten years last past I felt that this company could assure proper protection for our customers. I was not certain that companies such as National Bonded Cars, Inc., could. This was particularly true in light of an opinion of the Attorney General of the State of California disapproving of National Bonded's type of bond then being issued.

The Balboa mechanical insurance was likewise available to us at a lower cost.

/s/ VERNE F. GARRETT.

Subscribed and sworn to before me this 30th day of September, 1958.

[Seal] /s/ FRANCES E. WALDION,
Notary Public in and for the City and County of San Francisco, State of California.

Affidavit of Service by Mail attached.

[Endorsed]: Filed October 1, 1958.

[Title of District Court and Cause.]

## COUNTER AFFIDAVIT OF DEFENDANTS JACK L. ROBERTSON AND THE CENTRAL AGENCY OF SAN FRANCISCO, INCORPORATED

State of California,
City and County of San Francisco—ss.

Jack L. Robertson, being first duly sworn, deposes and says:

That he resides at 23 Grijalva Drive, San Francisco, California;

That he is the Vice President of The Central Agency of San Francisco, Incorporated (hereinafter referred to as "Central Agency"), and has been since the corporation was formed; that he has been in the insurance business for approximately thirteen years.

That said Central Agency has been conducting and now conducts a general insurance agency business, specializing in insurance pertaining to the sale of automobiles. Central Agency conducts its business activities in the main, with approximately three hundred automobile dealers in northern California, who were and now are placing various forms of insurance through the facilities of the Central Agency. The Central Agency was and is the general agent for the Balboa Insurance Company and other insurance companies.

That on or about the month of June, 1956, Francis B. Ryan came to the office of Central Agency to inquire as to renting desk space. After discussing the type of business that Mr. Ryan proposed to conduct, that of bonding the dealers against mechanical defects pertaining to the sale of their automobiles, it was decided that Mr. Ryan's business would be compatible with the activities of the Central Agency and Mr. Ryan was sub-let space in the offices of Central Agency. Since Mr. Ryan was unacquainted in the area at that time, Central Agency was able to assist the growth of his car bonding business by referring automobile dealers to him and he to the dealers; that during this common office space arrangement Mr. Ryan and I discussed our mutual problems such as car production losses and each party became quite familiar with each other's type of business.

In May of 1957, due to the business growth of both Central Agency and Mr. Ryan's business, it was necessary for Mr. Ryan to find larger quarters. He thereafter moved next door to the Central Agency office located at 2446 Van Ness Avenue, San Francisco. In the latter part of 1957, Mr. Ryan suggested to your affiant that he wanted Balboa to insure the mechanical warranty business that he, Ryan, had been developing; affiant informed Ryan that neither the Central Agency or Balboa could have any dealings with him while he was under contract with the National Bonded Cars, Inc., a mechanical warranty company. Central Agency and Mr. Ryan continued a friendly and co-operative

relationship, Central Agency providing certain insurance needs for Mr. Ryan and recommended Mr. Ryan to their many auto dealers who were interested in car warranties.

Between May and December of 1957, approximately fifteen automobile mechanical warranty companies started business in California. When some of the warranty companies began defaulting in their obligations to the automobile dealers and general public, many of the automobile dealers inquired of the Central Agency when the Central Agency and Balboa were going to enter into the mechanical warranty field with a stable, trustworthy business upon which they could depend. Central Agency gave the suggestion only passing interest until November of 1957, when, at the request of the State Department of Insurance, Attorney General Edmund G. Brown rendered his Opinion that mechanical warranties as were being offered by the various companies were in fact contracts of insurance and not merely an inspection service. Subsequent to said Opinion of the Attorney General and on or about December 28, 1957, the Department of Insurance requested the National Bonded Cars, Inc., which was represented by Mr. Ryan, to cease issuing warranties until such time that they properly qualified as an insurance company. There was wide publicity given to the Attorney General's Opinion and the Cease and Desist Order throughout the State, which came to the attention of the dealers through their trade journals and newspapers; as a result of said publicity, Central Agency

and Balboa were flooded with requests from automobile dealers to enter the mechanical guaranty field with a form of coverage which would meet the requirements of the State Department of Insurance. Central Agency, therefore, started to study seriously the warranty business as it related to the needs of their many automobile dealer clients.

Approximately in the latter part of December, 1957, or the first part of January, 1958, Mr. Ryan again came to the Central Agency to discuss insurance matters and stated he was gravely concerned over the developments in the warranty field, in view of the Attorney General's Opinion and the Cease and Desist Order. That he foresaw the loss of his business in view of the fact that the National Bonded Cars, Inc., had no plans to comply with the requirements of the State Department of Insurance. I told him that Central Agency would study the matter and in all probability would enter the field at a later date. Mr. Ryan stated that his contract with the National Bonded Cars, Inc., had been breached by his company in many particulars, chiefly because of the Opinion of the Attorney General and the failure of the National Bonded Cars, Inc., to pay their claims to the dealers and also because they had failed to pay his, Ryan's, commissions. I informed Mr. Ryan that we could not do business with him irrespective of the fact that his contracts had been breached, until he had formally terminated his contract with the National Bonded Cars, Inc.

It was evident that, in view of the many requests for Central Agency and Balboa to enter the mechanical warranty insurance business, we would have to go into the business even though it would be to the disadvantage of Mr. Ryan, with whom we had had friendly relations.

In the latter part of December, 1957, I proposed to Balboa that we enter the mechanical guaranty field. Balboa indicated that because I was personally identified with them as a former Northern California Branch Manager and as Central Agency was their general agent, they would give Central Agency first consideration. Because Central Agency and Balboa were, either jointly or separately, associated with the majority of the major automobile dealers, our success in the production end of any mechanical guaranty venture was assured in advance.

I, therefore, in behalf of Central Agency, started to compile statistics, policy forms and other information necessary to determine how much coverage could be afforded and upon what terms. Mr. Ryan had previously told us of his losses, but in view of the fact that he had no idea of the general losses of the plaintiff company, no information of value was received from him pertaining to loss ratios. In endeavoring to ascertain the loss ratios of the various warranty insurance companies that were in the business and to determine the manner in which Balboa should enter the mechanical warranty business, Central Agency representatives contacted the Employers Insurance Group who had previously reinsured the National Bonded Cars, Inc.; Central

Agency also received information from Mr. A. Morganstern, Chairman of the Board of Resolute Insurance Company, who were also in the mechanical warranty business; information was also obtained from the Premier Insurance Company.

During the next several months Central Agency and Balboa worked on a policy form, rates and methods to be used in the inspection of cars for the purpose of determining their mechanical condition. Central Agency decided that it would be advisable to obtain the services of an experienced man to oversee the inspection proceedings. We then began negotiations with Donald Brooks, unemployed at the time, to obtain an insurance agent's license and to set up a servicing organization. Mr. Brooks obtained the license and was duly appointed an agent of Balboa Insurance Company. He set up his own business under the fictitious name of Nationwide Auto Dealers Insurance Agency (hereinafter referred to as NADIA). That about the same time James Chambers, who was unemployed, presented himself to Central Agency as a party interested in similar inspecting arrangements for the Los Angeles area. Mr. Chambers obtained his insurance license and was appointed by Balboa as their agent and opened his office under the fictitious name of Nationwide Auto Mechanical Insurance Agency (hereinafter referred to as NAMIA), in Lynwood, California. It was contemplated that Brooks, doing business as NADIA, and Chambers, doing business as NAMIA, would also engage in other insurance

activities in behalf of Central Agency and any other company with whom Brooks or Chambers elected to do business. Neither Central Agency nor your affiant have ever had any financial interest or control over the activities of NADIA or NAMIA. Central Agency has advertised and aided in the solicitation of business for these two service agency companies for the purpose of building up Balboa's mechanical guaranty insurance business. In this connection, affiant states that at no time did affiant or the Central Agency obtain any trade secrets of any sort or character from Ryan, or from Brooks or Chambers, or anyone connected with National Bonded Cars, Inc.

In May of 1958, Brooks rented space in Central Agency's office in San Francisco and Central Agency launched a sales program with a general announcement to all of its dealers and through its sales staff. Premier Insurance Company was also writing insurance for the automobile dealers doing business with Bank of America. The Automobile Mechanical Insurance Agency, general agent of Balfour Guthrie Insurance Company was also in this field. The competition between these companies for the warranty business was very keen. They offered an insurance arrangement which was not disapproved by the State Department of Insurance, that was lower in net cost to the automobile dealers. In addition, the coverage offered by Premier and Balboa was the coverage underwritten by well-known companies with whom the automobile dealers had

been doing business for many years. Affiant states that in the first half of the year 1958 there was a noticeable drop in the sales of automobiles; that the competition of the various insurance companies that entered into the field in 1958, plus the drop in sales of cars, together with the Opinion of the Attorney General of California and the Cease and Desist Order issued by the Department of Insurance, were the prime factors that caused the loss of business by the National Bonded Cars, Inc. It is noted in the Affidavit of Geoffrey K. Clowes, filed in behalf of plaintiff, that the drop in the business of Ryan and Hacking's territories while under contract with National Bonded Cars, Inc., started in January and February of 1958; Central Agency and Balboa did not enter the field until May of 1958.

Geoffrey K. Clowes, in his said Affidavit, states that a San Francisco broker named Donald Lynch was assisted by your affiant in negotiations with several insurance companies, in an effort to find an insurance outlet for Ryan and Hacking's business. This affiant denies this statement in its entirety and states furthermore that he never communicated with Mr. Lynch in any manner relative to the sale of any business relating to mechanical guarantees. This affiant denies the statement contained in paragraph 6 of Mr. Clowes' Affidavit that he, affiant, ever made a determined and exhaustive examination of all of Ryan's and Hacking's records in the operation of plaintiff's business in both

Northern and Southern California, nor did affiant look at their records in any respect. It was clear from previous discussions had with Ryan and from what he had learned from the warranty business while Ryan was renting desk space in Central Agency's offices, that his records would not be of a nature from which accurate information could be derived. Central Agency never did agree to provide Ryan or Hacking with a market to write mechanical insurance. No member of Central Agency has ever represented that Balboa, NADIA or NAMIA was, or is connected with National Bonded Cars, Inc., to anyone. There was never an attempt to carry on business under the guise of the National Bonded Cars, Inc. Over forty per cent of the accounts initially signed up by NADIA were taken from warranty companies other than National Bonded Cars, Inc., and many of the remainder had never had a connection with any mechanical guarantee concern. Affiant and Central Agency never agreed to insure mechanical automobile warranties to be issued by organizations formed by Ryan and Hacking. Affiant had no knowledge as to any interest Ryan may have had or was to have in NADIA, nor any interest Hacking had or was to have in NAMIA.

In reply to paragraph 18 of the Affidavit of Mr. Clowes, affiant admits that he participated in endeavoring to negotiate a deal between Balboa and NADIA. Affiant denies, however, that he had access to or made any investigation of plaintiff's con-

fidential records in Ryan's possession, or otherwise, nor did affiant make any statement to this effect at any meeting with Clowes. Affiant further denies that any such information from any of plaintiff's confidential records had been submitted for examination to one Mr. Devany of Balboa. Affiant further denies that he had any control over the dealers who had been using plaintiff's program.

In conclusion, if Central Agency is forced to discontinue doing business with Brooks and his tradename of NADIA and Chambers and his trade name of NAMIA, it would result in a chaotic situation under which we would find it extremely difficult to render proper services to the members of the public and the automobile dealers who avail themselves of our program; our policies, written through Balboa, refer the customers to NADIA and NAMIA for claims adjustment and other services.

In building up an insurance program in connection with the mechanical warranty business of both NADIA and NAMIA, this affiant states that he and Central Agency did so by lawful and competitive means and at no time entered into any conspiracy with Ryan or any other person to do or perform any unlawful act, or to do or perform any act by unlawful means, nor in building up said program did affiant or Central Agency at any time induce or use any means to induce Ryan to breach any contract between plaintiff and Ryan or Hacking.

/s/ JACK L. ROBERTSON.

Subscribed and sworn to before me this 26th day of September, 1958.

[Seal] /s/ FRANCES E. WALDION,
Notary Public in and for the City and County of San Francisco, State of California.

Affidavit of Service by Mail attached.

[Endorsed]: Filed October 1, 1958.

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[Title of District Court and Cause.]

## AFFIDAVIT OF DONALD BROOKS IN OPPOSITION TO MOTION FOR PRELIMINARY INJUNCTION

State of California,
City and County of San Francisco—ss.

Donald Brooks, being first duly sworn, deposes and says:

That he resides in the City of Oakland, County of Alameda, State of California.

That prior to meeting or having known defendant Francis B. Ryan, one of the defendants herein, and on or about September, 1956, affiant formed and headed as owner a company known as United Car Warranty Company, the purpose of which was to organize used car dealers to handle his warranty and in turn sell, or in some way pass these warranties on to their Customers, the purpose being to

warrant the mechanical parts of the customers' automobiles for one year.

After laying the necessary plans and trade operations, contracting with mechanics capable of inspecting the dealers' cars, affiant then edited forms and advertising material for use by said dealers. An office was rented in the Syndicate Building, Oakland, California, from which all business was to be conducted. All elements for the formula of a successful operation were at affiant's disposal, with the exception of an insurance company to underwrite said warranties. Between September, 1956, and May, 1957, affiant signed agreements with approximately thirty (30) used car dealers to inspect and warrant their cars and supply them with forms and advertising material, to assist them in the promotion of affiant's warranties. Subject to obtaining suitable insurance coverage. This affiant made every effort to obtain from several insurance brokers and the Northern California broker for Lloyd's of London.

In May, 1957, affiant's efforts for insurance protection became noticeably unsuccessful, at which time United Warranty Company liquidated.

Thereafter, during the month of May, 1957, affiant contacted Francis B. Ryan, one of the defendants herein for the purpose of obtaining employment as a salesman, and thereafter affiant worked as a salesman for said Francis B. Ryan. At the time of obtaining said employment, affiant was advised by said Francis B. Ryan that the National Bonded Cars,

Inc., warranties were insured by an insurance company. Having the necessary insurance backing, affiant was able to sign agreements with upwards of fifty (50) new car dealers in Mr. Ryan's territory, between May, 1957, and November, 1957.

In November, 1957, affiant learned, by way of the Attorney General of the State of California, that National Bonded Cars, Inc., did not comply with the regulations of the Insurance Commission of the State of California, and immediately thereafter affiant resigned his employment with said Francis B. Ryan.

After such resignation, affiant had been employed as a wholesale and retail automobile salesman, until the end of April, 1958. Thereafter, since the month of May, 1958, affiant is and has been engaged in the business of selling insurance for Central Agency, one of the defendants herein.

Since his resignation as a salesman for said Francis B. Ryan, affiant has never been engaged in selling mechanical automobile warranties, such as those sold or issued by or on behalf of the plaintiff; that neither said Francis B. Ryan, nor anyone on his behalf or on behalf of the plaintiff, has at any time imparted to said affiant any trade secrets of said plaintiff, and that said affiant has never entered into any agreement, written or oral, with the plaintiff or anyone on its behalf, of any kind or character whatsoever, whereby he obligated himself to refrain from engaging in any legal occupation.

Affiant further states that he at no time conspired with any of the defendants, or any other persons, to deprive plaintiff of any of its business or property through illegal means.

/s/ DONALD BROOKS.

Subscribed and sworn to before me this 29th day of September, 1958.

[Seal] /s/ JEAN M. PHILLIPS,
Notary Public in and for the County of Marin, State of California.

My commission expires 9-14-60.

[Endorsed]: Filed October 1, 1958.

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[Title of District Court and Cause.]

AFFIDAVIT OF FRANCIS B. RYAN, ON BEHALF OF DEFENDANTS FRANCIS B. RYAN, DONALD BROOKS, TRUMAN RENZ, AND NADIA, IN OPPOSITION TO MOTION FOR PRELIMINARY INJUNCTION

State of California,
City and County of San Francisco—ss.

Francis B. Ryan, being first duly sworn, deposes and says:

That he presently resides in the State of California; that prior to December, 1955, he resided in the State of New Jersey, and that on the 12th day of

December, 1955, he entered into a License and Franchise Agreement, a copy of which is attached to the complaint on file herein and designated as Exhibit A.

That at the time of entering into such agreement, plaintiff herein represented to affiant that the said plaintiff was the owner of certain ideas, forms, plans, system and knowledge for engaging in the business of the inspection of all major mechanical parts of used or new cars and the issuance of an independent Warranty thereof. That pursuant to the terms of said agreement plaintiff herein agreed to furnish affiant with its ideas, forms, plans, system and knowledge for the making of automobile inspections and the issuance of warranties for the purchases of approved new or used cars within the territory described.

That the term of said agreement was for a period of one (1) year, commencing on the 12th day of December, 1955, with provision that the said agreement should be automatically renewed thereafter from year to year, unless affiant should give written notice to the plaintiff of his desire to terminate the agreement not later than sixty (60) days prior to the end of the then current term.

Said agreement further provided that the affiant agrees to comply in all respects with all laws, statutes and regulations, Federal, State, County and Municipal, and all other Governmental authorities that may be necessary for or incidental to the conduct of the business.

That thereafter, on or about February 7, 1957, C. Wesley Milburn, Treasurer of the plaintiff corporation, telephoned to the affiant and stated that it would be necessary for all District Managers to sign a new form of agreement, which is in all respects the same as the existing agreement, except that the title should be changed to read "Area Franchise Agreement," in lieu of "License and Franchise Agreement," and that on or about the 7th day of February, 1957, said C. Wesley Milburn, copy of which is attached hereto, marked Exhibit A, and made a part hereof, enclosing two executed copies of new Agreement, and stating that the same was required by New York law, and requesting that the new Agreement be executed so that the plaintiff should not be in difficulties in California, because of an interpretation by the Insurance Commission.

That affiant had been acting pursuant to and under the terms of the Agreement dated December 12, 1955, and had at all times complied with all the terms and conditions thereof within his power so to do. That the plaintiff, by its action as aforesaid, with reference to the execution of the Agreement dated February 7, 1957, attached to the complaint on file herein and marked Exhibit A, perpetrated fraud on the affiant in inducing the affiant to execute the same by stating that it was a mere matter of form rather than substance that was being changed, while in truth and in fact plaintiff omitted the representation as to the performance of such warranties being insured under a master policy

with the Employers Liability Insurance Corporation, Ltd., or any insurance company. That affiant relied upon the promises so made by the plaintiff and would not have executed said Agreement if it had not been for such false and fraudulent representations so made by the plaintiff to the affiant. That by reason of said fraud affiant was damaged in large sums of money, the exact amount of which is unknown to him at this time.

That the Agreement dated February 7, 1957, likewise provided that the affiant shall comply in all respects with all the laws, statutes and regulations, Federal, State, County and Municipal and all other Governmental authorities that may be necessary for or incidental to the conduct of the business of such area representative. That based upon plaintiff's representations, affiant was acting under the impression that plaintiff had complied with the laws and regulations of the State of California, as the same may be affected in any manner by any insurance laws of said State, and that warranties issued were insured under a master policy with the Employers Liability Insurance Corporation, Ltd.

That plaintiff herein had never furnished the affiant with any of the ideas, forms, plans, system and knowledge, for engaging in the business of the inspection of all major mechanical parts of new or used cars and the issuance of an independent Warranty thereof, as provided for in said Agreements, and have never imparted any trade or business secrets of any kind to the affiant.

That under the opinion of the Attorney General of the State of California, dated November 21, 1957, under number 57/148, the activities of said plaintiff and said defendants in the State of California were deemed in violation of the insurance laws of the State of California, and therefore said agreements were rendered impossible of performance.

It is the affiant's position that the Agreements hereinabove referred to were in violation of the laws of the State of California and contrary to public policy, in that the activities required of the affiant had for its purpose the undertaking to indemnify purchases of automobiles against loss, damage or liability, arising from a contingent or unknown event resulting from mechanical failures of automobiles without insurance coverage as represented to the affiant by the plaintiff.

Even assuming, without prejudice, that said Agreement of December 12, 1955, was legal, plaintiff has breached the same in many particulars, among others, failure to furnish affiant with ideas, forms, plans, system and knowledge for engaging in the business of the inspection of all major mechanical parts of used or new cars and the issuance of independent Warranty thereof, and providing insurance for such warranties.

That the Agreement of February 7, 1957, was induced through fraud and misrepresentation and likewise was in violation of the laws of the State of California, and therefore was impossible of performance.

This affiant further states that in addition to the ruling of the Attorney General of the State of California, as aforesaid, it became impossible for this affiant to conduct business on a profitable basis because of circularization among auto dealers, warning against mechanical condition guaranties by the Better Business Bureau of Los Angeles, under date of June 19, 1957, and the circularization by the Better Business Bureau of San Francisco, under date of December 2, 1957, and a Memorandum to Automobile Dealers, stating that Warranty Companies, dealing in used cars are under Insurance Commission, as well as Motor Car Dealers Association circular on May 20, 1958, pointing out to its membership that the California Insurance Commission had taken exception to the practices or policies of certain used car warranty groups, claiming that these operations should be under the jurdisction of the Insurance Department. That because of the warnings above stated, and plaintiff's failure to furnish insurance coverage, affiant's business came to a virtual standstill, and the agreements were impossible of further performance, even if determined to be legal.

That affiant, defendants Brooks and Rentz, are not now or ever since the filing of said action, and for some time prior thereto, have not been engaged in the business of selling mechanical automobile warranties, such as those issued by the plaintiff, and that defendant NADIA is not nor, or ever has been, engaged in the business of selling mechanical auto-

mobile warranties such as those issued by the plaintiff.

That on or about the 18th day of August, affiant delivered to plaintiff, all books, records, files, and accounts on employees relating to his business with the plaintiff and is not now acting or purporting to act as plaintiff's area representative in the territory referred to in said Agreement.

That affiant at no time caused any transfer of plaintiff's accounts to defendant NADIA or any other person or organization.

That affiant denies that he had entered into any conspiracy with any other defendants, or any other persons, to deprive plaintiff of any of its property or business, as alleged in said complaint, or at all.

/s/ FRANCIS B. RYAN.

Subscribed and sworn to before me this 29th day of September, 1958.

[Seal] /s/ JEAN M. PHILLIPS,
Notary Public in and for the County of Marin, State of California.

My commission expires 9/14/60.

EXHIBIT A

National Bonded Cars, Inc.
Executive Offices: 120 Morris Avenue
Springfield, N. J.
DRexel 6-4900

C. Wesley Milburn, Treasurer

February 7, 1957.

Mr. Frank B. Ryan,
National Bonded Cars of Northern California,
2446 Van Ness Ave.,
San Francisco, California.

Dear Frank:

We are enclosing herewith two executed copies of the new agreement which is required by New York law between National Bonded Cars, Inc., and its District Managers.

Will you kindly execute both, return one to us, together with your old franchise, so that we will not be in difficulties in California because of an interpretation by the Insurance Commission.

It is very important that we have these in our office as soon as possible so please return your old franchise and a signed copy of the new by Air Mail.

Cordially yours,

NATIONAL BONDED CARS,
INC.,

/s/ WESS,

C. WESLEY MILBURN,
Treasurer.

Sent 2/12/57.

CWM:bk
Encls.

Affidavit of Service by Mail attached.

[Endorsed]: Filed October 1, 1958.

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[Title of District Court and Cause.]

## AFFIDAVIT OF JOHN P. DEVANEY

State of California,
County of Los Angeles—ss.

John P. Devaney, being duly sworn, deposes and says:

That he is the Executive Vice-President of Balboa Insurance Company, a defendant in the above-entitled action. That he makes this affidavit in opposition to plaintiff's motion for a preliminary injunction.

Hereinafter in this affidavit various defendants shall be referred to by the same names they are referred to in the Complaint.

Balboa is an insurance company doing business in the State of California under and by virtue of

the laws of said State and pursuant to a license issued by the Insurance Commissioner thereof.

Your affiant states that on June 7, 1958, Balboa entered into an agency agreement with Central for the issuance of mechanical warranties. This agreement was executed after your affiant and other management executives of Balboa exercised their underwriting judgment as to the premium rate, the extent of coverage, and other matters related to mechanical warranty policies. In the exercise of that judgment your affiant considered the loss ratio experience of several companies including Resolute Insurance Company, Employers' Liability Insurance Corporation, and Continental Casualty Insurance Company.

This information was furnished Balboa not only by Robertson, as Balboa's producing agent, but by agents or employees of the above-named insurance companies as well. In this connection affiant is informed that Ryan did not have and could not furnish complete or reliable loss ratios of plaintiff or other information of value and that it was necessary for Robertson in formulating an underwriting proposal to Balboa to secure information from other insurers engaged in writing this type of coverage.

Your affiant states that Central is and has been Balboa's producing agent since 1953 and that its duties as such are expressly set forth under the terms of a written contract. One of the duties of Central as Balboa's agent is the compiling of statisti-

cal information including loss experience, premium rates and policy coverages pertaining to the issuance of policies by Balboa. Said information is commonly available from the various companies engaged in the writing of the different classes of insurance, assureds whose losses are covered by the policies, other agents or producers engaged in producing the same type of insurance, and in various public records including national publications specializing in insurance matters. These and similar duties are customarily performed in the insurance business by all insurance producers, both brokers and agents, and it is from such information that insurance companies are able to establish rates which are not excessive, inadequate, nor unfairly discriminatory.

As a licensed insurer, Balboa is governed by the laws of the State of California as contained in the Insurance Code. Section 1852 of said Code provides that an insurer's rates shall not be excessive, inadequate, or unfairly discriminatory and that in the making of rates "consideration shall be given to the extent applicable, to past and prospective loss experience within and outside this State, to conflagration and catastrophe hazards, to a reasonable margin for underwriting profit and contingencies, to past and prospective expenses both country-wide and those specially applicable to this State, and to all other factors, including judgment factors, deemed relevant within and outside this State." Section 1853 of said Code provides: "Subject to and in compliance with the provisions of this chapter authoriz-

ing insurers to be members or subscribers of rating or advisory organizations or to engage in joint underwriting or joint reinsurance, two or more insurers may act in concert with each other and with others with respect to any matters pertaining to the making of rates or rating systems, the preparation or making of insurance policy or bond forms, underwriting rules, surveys, inspections and investigations, the furnishing of loss or expense statistics or other information and data, or carrying on of research."

In one of the provisions in the contract between Balboa and Central, Central was authorized to enter into subagency contracts with other licensed insurance agents. Under the terms of said contract, and as is common and customary in the insurance business, Central had authority to appoint its subagents without the approval or control of Balboa. This appointment is accomplished by the filing by Central with the Insurance Commissioner of the State of California a written record of the appointment.

The verified affidavit of Geoffrey K. Clowes in support of plaintiff's motion for a preliminary injunction, on page 3, lines 13 to 15, states that a Donald B. Lynch "on behalf of Ryan and Hacking approached other insurance companies including Balboa * * *" Your affiant states that neither he nor any other employee of Balboa ever heard of, or spoke to, any person known as Donald B. Lynch,

nor has he had any negotiations with any such person at any time.

Mr. Clowes states on page 3, paragraph 6, of his affidavit that in negotiations with Ryan and Hacking your affiant directly requested a "detailed and exhaustive examination of all of Ryan and Hacking's records in the operation of plaintiff's business in both Northern and Southern California" and that plaintiff's loss ratio experience, "highly confidential information," was given by Ryan and Hacking. Your affiant states that no such request was made by him at any time. Your affiant further states that the loss ratio experience of insurance companies, writing this and comparable types of insurance, is a matter of public record, published semi-annually in national circulation trade-magazines such as Insurance Spectator, Best's Insurance Guide, National Reporter, Western Underwriter, Insurance Investor, and others.

In November, 1957, the Attorney General of California issued an opinion at the request of the Insurance Commissioner holding that mechanical warranties of the type described in plaintiff's Complaint were insurance policies and that any company issuing them must be licensed as an insurance carrier in the State of California. As a direct result of this opinion of the Attorney General, and because plaintiff was not a licensed insurance carrier, the Insurance Commissioner of the State of California on December 23, 1957 issued a letter directed to

plaintiff herein, ordering said plaintiff to cease and desist from engaging in the issuance or sale of said mechanical warranties.

Neither your affiant nor other employees of Balboa had prior knowledge of any appointment of NADIA and NAMIA as Central's subagents. Neither affiant nor any other employees of Balboa now have, nor ever have had, any knowledge of the ownership of defendants NADIA and NAMIA and does not have any information of the terms or conditions of its agreements or relationships, if any, with either Ryan, Hacking, Renz, Brooks, Chambers, and the plaintiff.

Affiant specifically denies that he, Balboa, or any of Balboa's employees ever engaged in or had knowledge of any conversation, arrangement, agreement, or conspiracy to destroy the business of plaintiff and to divert plaintiff's accounts and customers to itself or any other organization, nor to induce Ryan and Hacking or any other employees or agents of plaintiff to breach or terminate any arrangements or contracts existing between them.

Except as otherwise expressly set forth in this affidavit, affiant denies each and every statement pertaining to conduct by affiant and Balboa set forth in the affidavit of Geoffrey K. Clowes on file with this Court.

/s/ JOHN P. DEVANEY.

Subscribed and sworn to before me this 30th day of September, 1958.

[Seal] /s/ EDMUND W. COOKE,
Notary Public in and for the County of Los Angeles, State of California.

My Commission expires May 7, 1960.

Receipt of Copy acknowledged.

[Endorsed]: Filed October 2, 1958.

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[Title of District Court and Cause.]

## AFFIDAVIT OF E. N. HACKER

State of California,
City and County of San Francisco—ss.

E. N. Hacker, being first duly sworn, deposes and says:

That I am an automobile dealer doing business under the name of Hacker Motor Company, with offices at 2345 Broadway, Oakland, California.

I have been associated with the Balboa Insurance Company for many years, and when I heard they were offering mechanical insurance for their various dealers I requested they explain the mechanical insurance to me. I dealt with the Balboa Insurance Company on many occasions through the Central Agency.

Upon learning that Balboa offered a legitimate insurance coverage to my customers, I began selling Balboa mechanical insurance to them.

Prior to this time I was offering my customers a used car mechanical warranty issued by National Bonded Cars, Inc. I selected the Balboa Insurance Company instead of the services offered by National Bonded Cars, Inc., for the following reasons:

1. It was less expensive than National Bonded Cars.

2. It appeared to comply with an opinion of the Attorney General of the State of California which had come to my attention.

3. I felt it my prerogative to select a company in which I had complete confidence.

/s/ E. N. HACKER.

Subscribed and sworn to before me this 27th day of September, 1958.

[Seal] /s/ WALTER E. ALLEE,
Notary Public in and for the City and County of San Francisco, State of California.

My Commission expires July 23, 1962.

[Endorsed]: Filed October 6, 1958.

[Title of District Court and Cause.]

MEMORANDUM AND ORDER

Plaintiff has asked for a preliminary injunction enjoining the defendants from soliciting plaintiff's former franchised automobile dealers to enter into agreements providing for the inspection of their automobiles and issuance of warranties or certificates of insurance covering the mechanical parts of said automobiles by any one other than plaintiff, and from using trade secrets of the plaintiff in such business. Plaintiff, a New Jersey corporation, is engaged in the business of inspecting used cars for automobile dealers, and issuing through said dealers to the purchasers of automobiles so inspected and approved warranties protecting them against the cost of repairs or replacement of the automobile parts specifically listed in said warranties. In essence, the plaintiff asserts that the defendants, through defendants Ryan and Hacking, former employees of plaintiff, have obtained the trade secrets of its business, and the customer lists of plaintiff in California, and that the defendants are using this information and these trade secrets unfairly. On the basis of this complaint the plaintiff has sought a preliminary injunction upon the ground that irreparable injury will be caused if the defendants are not required to cease and desist from the use of the information illegally obtained, and from soliciting plaintiff's customers upon the basis of that information.

The record shows that there is now pending in the Superior Court of the State of California, in and for the City and County of San Francisco, an action for declaratory relief and for an injunction by the plaintiff against F. Britton McConnell, as Insurance Commissioner of the State of California, asking the State court to declare that the Insurance Commissioner has no jurisdiction to require plaintiff to qualify as an insurer, or to procure a certificate of authority in order to engage in business, and adjudging and declaring that plaintiff's business is not insurance as defined by the Insurance Code of California, and in the alternative plaintiff asks for an injunction to restrain the Commissioner from enforcing a cease and desist order issued by him on December 23, 1957. The cease and desist order was issued by the Insurance Commissioner pursuant to an opinion of the Attorney General of the State of California, which was issued November 21, 1957 (30 Ops. Cal. Atty. Gen. 253) to the general effect that plaintiff was engaged in the insurance business, and was required to qualify under the Insurance Code of the State of California as an insurer. On January 28, 1958, the State court issued a preliminary injunction enjoining the Commissioner from enforcing his cease and desist order, and from interfering with plaintiff in carrying on its business in the State of California.

The federal action was commenced on September 4, 1958, and the parties have stipulated that the action in the State court is now pending in the status

of having a preliminary injunction in full force and effect, and is awaiting further proceedings.

Defendants have challenged the right of the plaintiff to a preliminary injunction in this action upon the ground that there is a doubtful question of law involved in the State court action, in that the right of the plaintiff to do business in California is now the subject of litigation in the courts of the State of California, and that all of the injuries which plaintiff claims must necessarily flow from its right to do business in this State, and further, that until the right of the plaintiff to do business in California is determined by the State courts, this Court should not use its extraordinary injunctive power.

Defendants' contention is based on the broad equitable principle that a preliminary injunction will not issue where the right which complainant seeks to have protected is in doubt. See 43 C.J.S. Injunctions, § 19, pp. 431, 434. See also 27 Cal. Jur. 2d, Injunctions, § 48.

This general rule is recognized in various federal jurisdictions. See: Sneider vs. Transcontinental & Western Air, Inc., 79 F. Supp. 339, 341 (D. C. Del. 1948); American Radiator & Stand. San. Corp. vs. Sunbeam Corp., 125 F. Supp. 839, 841 (D. C. S. D., N. Y. 1954); and Alaska Sales and Service vs. Rutledge, 128 F. Supp. 1, 3 (D. C. Alaska 1955). These and numerous other cases stand for the basic proposition that where there is a doubtful question of law or fact a preliminary injunction will not be granted.

Plaintiff recognizes this rule, but contends that it is not applicable to this case because the preliminary injunction heretofore issued by the State court gives it the right to do business in California at the time the issue on the injunction in this Court is being considered, and that in any event the issue of the right to do business under the provisions of the Insurance Code of the State of California is immaterial to the granting of a preliminary injunction in the Federal Court action. In any event the plaintiff contends that this question should not be determined as a matter of law, but that additional evidence should be taken, so that the Court can balance the equities between the parties to determine the importance of the question of the necessity to secure a license from the State of California.

The Court concludes that as a matter of law upon the present state of the record the application for preliminary injunction should be denied. The whole business relationship which plaintiff seeks to protect by preliminary injunction is dependent upon its right to do business in California. The trade secrets, the confidential information and the customer lists which plaintiff seeks to protect can only be used in connection with this business relationship in California, and the defendants' alleged unlawful appropriation of those business rights is involved with doing business only in California. Therefore, plaintiff can be harmed if at all, only if it has the right to do business in California. This very right is the subject of the undetermined action pending in the State court. Based upon the undisputed record be-

fore this Court, it is apparent that plaintiff's right to a preliminary injunction rests upon a disputed question of law. In that situation this Court should not exercise its discretion in favor of the preliminary injuction.

It is, therefore, Ordered that plaintiff's application for a preliminary injunction be, and the same is hereby denied. Counsel for defendants are directed to prepare and present findings, conclusions and an order in accordance herewith.

Dated: October 7, 1958.

/s/ OLIVER J. CARTER,
United States District Judge.

[Endorsed]: Filed October 7, 1958.

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[Title of District Court and Cause.]

## PROPOSED MODIFICATIONS OF FINDINGS OF FACT AND CONCLUSIONS OF LAW

Plaintiff proposes the following modifications of the findings of fact and conclusions of law filed by the defendants in the above action:

### Findings of Fact

1. Page 3, line 1 of defendants' findings of fact should be modified to read as follows:

"the business of inspecting all major mechanical parts of automobiles and issuing warranties in connection therewith to the purchasers of automobiles,"

Reasons for Modification: Paragraph 2 of plaintiff's verified complaint alleges that plaintiff's business consists of inspecting automobiles as well as issuing warranties thereon. This allegation was not denied by any of the defendants. Judge Carter's Memorandum and Order, dated October 7, 1958 (page 1, second sentence), is to the same effect.

2. The first complete sentence on page 3 of said findings (lines 3 to 7) should be deleted.

Reasons for Modification: Judge Carter's aforesaid Memorandum and Order did not include such a finding and nothing in the record supports it.

3. Page 3, lines 16 and 17 of said findings, should be modified to read as follows:

"issue its warranties in the State of California and adjudging and ordering that the issuance of said warranties by plaintiff is not insurance as defined by the Insurance Code of"

and page 3, lines 24 to 26 of said findings, should be modified to read as follows:

"(Gen. 253), to the general effect that organizations like plaintiff issuing warranties in the State of California are transacting insurance business and are required to qualify as insurers under the Insurance Code of the State of California."

Reasons for Modifications: The only evidence in the record as to the nature of the state court proceeding is the Attorney General's Opinion (30 Ops., Cal. Atty. Gen. 253), the Insurance Commissioner's

"cease and desist" order of December 23, 1957, and plaintiff's complaint against the Insurance Commissioner for declaratory relief and an injunction. Defendants' findings, referred to above, misconceive the effect of said evidence. A reading of the aforesaid documents makes it apparent that the only aspect of plaintiff's business which the Attorney General held was the transaction of insurance and with respect to which the Insurance Commissioner issued his "cease and desist" order was the issuance by plaintiff of its warranties. The findings should reflect this fact specifically rather than indicate, as defendants' findings purport to do, that plaintiff's general right to do business in California is in issue in the state court proceeding.

4. Page 4, line 1, of said findings should be modified to read as follows:

"the right of the plaintiff to issue its warranties in California without qualifying as an insurer"

Reasons for Modification: Nothing in the record indicates that there is any dispute, subject to litigation in the state courts or otherwise, as to the plaintiff's right to do business in California. The Attorney General's Opinion, the Insurance Commissioner's "cease and desist" order, and the plaintiff's complaint in the Superior Court Action (No. 475485) clearly show that the only question which is subject to litigation in the state court is whether or not plaintiff has the right to issue its warranties in California without qualifying as an insurer. As

indicated previously, plaintiff's business has heretofore consisted of inspecting automobiles as well as issuing warranties thereon. Plaintiff's right to inspect automobiles in California has never been, and undoubtedly cannot be, questioned. Likewise, plaintiff's right to utilize its inspection expertise and other confidential information in furnishing the same service to California residents as has heretofore been furnished by it, but without the issuance of its warranties, is not subject to litigation in the state court.

5. The language beginning with the word "and" on page 4, line 3 and ending with the word "California" on page 4, line 7 of said findings should be deleted.

Reasons for Modification: This language is based on the erroneous finding (described in item 4 above) that plaintiff's right to do business in California is the subject of litigation in the state court. If the true finding were submitted for the erroneous one, then, said language should be deleted as having no foundation in the record or in reason. Said substitution would change said language to read as follows:

"and that all of the injuries which plaintiff claims, and the property rights claimed by plaintiff consisting of certain alleged trade and confidential secrets and customers' lists are dependent upon plaintiff's right to [issue its warranties in the State of California without qualifying as an insured.]"

At the hearing on plaintiff's motion for a preliminary injunction plaintiff offered to prove that the property rights sought to be protected by it were not dependent upon its right to issue its warranties in California. The Court refused to hear evidence on this subject, thus keeping out of the record the only possible basis for the above finding.

Conclusions of Law

6. The conclusions of law (page 4, lines 8 to 17) are meaningless in that they are based on the erroneous finding that the disputed question of law in the state court proceeding is whether or not plaintiff has the right to do business in California. As heretofore stated, that is not the question before the state court. It is submitted that the actual question of law before the state court, to wit, whether or not plaintiff has the right to issue its warranties in California without qualifying as an insurer, is not at all material in the instant action.

Respectfully submitted,

PHILIP S. EHRLICH,
FELDMAN & O'DONNELL,
JESSE FELDMAN,
MURRY J. WALDMAN,

By /s/ MURRY J. WALDMAN,
Attorneys for Plaintiff.

Affidavit of Service by Mail attached.

[Endorsed]: Filed October 20, 1958.

[Title of District Court and Cause.]

## FINDINGS OF FACT AND CONCLUSIONS OF LAW

### Findings of Fact

Plaintiff filed a complaint against the above-named defendants and on the basis of said complaint and an affidavit of Geoffrey K. Clowes, and on the ground that irreparable injuries will be caused if the defendants are not required to cease and desist from the use of the information alleged to be illegally obtained and from soliciting plaintiff's customers upon the basis of that information, made a motion for preliminary injunction enjoining the defendants from soliciting plaintiff's former franchise automobile dealers to enter into agreements providing for the inspection of their automobiles and issuance of warranties on a certificate of insurance covering the mechanical parts of said automobiles by any one other than plaintiff and using trade secrets of plaintiff in such business.

Defendants Francis B. Ryan, Donald Brooks, and Nation-Wide Automobile Dealers Insurance Agency, as well as defendants Jack L. Robertson, The Central Agency of San Francisco, Incoroprated, and Balboa Insurance Company, filed their respective affidavits and Memorandums of Points and Authorities in opposition to said motion.

Said defendants severally and jointly challenged

plaintiff's right to such preliminary injunction on several grounds but, particularly, they challenged the right of the plaintiff to a preliminary injunction in this action upon the ground that there is a doubtful question of law in the State of Court action in that the right of the plaintiff to do business in California is now the subject of litigation in the Courts of the State of California, and that all of the injuries which plaintiff claims must necessarily flow from its right to do business in the State and further that until the right of the plaintiff to do business in California is determined by the State Courts, this Court should not use its extraordinary injunctive power.

This cause came on regularly for hearing before the Court, Philip S. Ehrlich, Feldman & O'Donnell, Jesse Feldman and Murry J. Waldman, by Jesse Feldman and Murry J. Waldman, appearing as counsel for the plaintiff and Wallace, Garrison, Norton & Ray, by Maynard Garrison, Esq., appearing for defendant Balboa Insurance Company, and A. Brooks Berlin and Alvin A. Lobree, appearing as counsel for defendants Jack L. Robertson and The Ceneral Agency of San Francisco, Incorporated, and Vladimir Vucinich, Esq., appearing for defendants Francis B. Ryan, Donald Brooks, and Nation-Wide Automobile Dealers Insurance Agency, and the Court having examined the proofs offered by the respective parties, hearing the arguments of counsel and being fully advised in the premises, the following findings of facts and conclusions of law

constituting the decision of the Court in said action are hereby made:

1. That plaintiff, a New Jersey corporation, is engaged in the business of issuing warranties to the purchasers of automobiles, protecting them against the cost of repairs or the replacement of the automobile parts specifically listed in said warranties. The business is conducted through (area representatives), who, as a matter of practice, inspect used cars, for automobile dealers and cause plaintiff's warranties to be issued through such dealers to the purchasers of automobiles so inspected.

2. That the record shows that there is now pending in the Superior Court of the State of California, in and for the City and County of San Francisco, an action, No. 475485, for declaratory relief and for an injunction by the plaintiff against F. Britton McConnell, as Insurance Commissioner of the State of California, asking the State Court to declare that the Insurance Commissioner has no jurisdiction to require plaintiff to qualify as an insurer, or to procure a certificate of authority in order to engage in business and adjudging and declaring that plaintiff's business is not insurance as defined by the Insurance Code of California, and in the alternative plaintiff asks for an injunction to restrain the Commissioner from enforcing a cease and desist order issued by him on September 23, 1957. The record further shows that the cease and desist order was issued by the Insurance Commissioner pursuant to

an opinion of the Attorney General of the State of California issued November 21, 1957 (30 Ops. Cal. Atty. Gen. 253), to the general effect that plaintiff was engaged in the insurance business and was required to qualify under the Insurance Code of the State of California as an insurer.

3. That on January 28, 1958, the Superior Court of the State of California, in said action, issued a preliminary injunction, enjoining the Insurance Commissioner from enforcing the said cease and desist order and from interfering with plaintiff and carrying on of its business in the State of California during the pendency of said action, or until the Court shall otherwise order.

4. The right of the plaintiff to do business in California is now the subject of litigation in the Courts of the State of California and that all of the injuries which plaintiff claims, and the property rights claimed by plaintiff consisting of certain alleged trade and confidential secrets and customer's lists, are dependent upon plaintiff's right to do business in the State of California.

Conclusions of Law

Based upon the undisputed record before the Court, it is apparent that plaintiff's right to preliminary injunction rests upon a disputed question of law, and that until the right of the plaintiff to do business in California is determined by the State Courts, this Court should not use its extraordinary

injunctive power, based on the equitable principle that a preliminary injunction will not issue where the right which plaintiff seeks to have protected is in doubt.

Let the Order be entered accordingly.

Dated this 13th day of October, 1958.

/s/ OLIVER J. CARTER,
Judge of the District Court.

[Stamped]: Oct. 31, 1958.

Disapproved October 13, 1958.

PHILIP S. EHRLICH,
FELDMAN & O'DONNELL,
JESSE FELDMAN,
MURRY J. WALDMAN,

By /s/ MURRY J. WALDMAN,
Attorneys for Plaintiff.

Affidavit of Service by Mail Attached.

Lodged October 15, 1958.

United States District Court for the Northern District of California, Southern Division

Civil Action No. 37635

NATIONAL BONDED CARS, INC.,

Plaintiff,

vs.

FRANCIS B. RYAN, DONALD BROOKS, A. E. HACKING, JAMES CHAMBERS, TRUMAN RENZ, JACK L. ROBERTSON, DONALD B. LYNCH, NATIONAL BONDED CARS OF SOUTHERN CALIFORNIA, INC., BALBOA INSURANCE COMPANY, THE CENTRAL AGENCY OF SAN FRANCISCO, INCORPORATED, NATION-WIDE AUTOMOBILE DEALERS INSURANCE AGENCY, and NATION-WIDE AUTOMOBILE MECHANICAL INSURANCE AGENCY, INC.,

Defendants.

## ORDER DENYING MOTION FOR PRELIMINARY INJUNCTION

This cause came on regularly for hearing on the 6th and 7th days of October, 1958, before the above-entitled Court, Philip S. Ehrlich, Feldman & O'Donnell, Jesse Feldman and Murry J. Waldman, by Jesse Feldman and Murry J. Waldman, appearing as counsel for the plaintiff, and Wallace, Garrison, Norton & Ray, by Maynard Garrison, Esq., appearing for defendant, Balboa Insurance Com-

pany, and A. Brooks Berlin and Alvin A. Lobree, appearing as counsel for defendants, Jack L. Robertson and The Central Agency of San Francisco, Incorporated, and Vladimir Vucinich, Esq., appearing for defendants, Francis B. Ryan, Donald Brooks, and Nation-Wide Automobile Dealers Insurance Agency, and the Court having examined the proofs offered by the respective parties and having heard the arguments of respective counsel and being fully advised in the premises, and findings of fact and conclusions of law having been submitted and approved,

It Is Therefore Ordered that plaintiff's application for preliminary injunction herein be and the same is hereby denied.

Done in Open Court This 31st day of October, 1958.

/s/ OLIVER J. CARTER,
United States District Judge.

Approved as to form October 15, 1958.

PHILIP S. EHRLICH,
FELDMAN & O'DONNELL,
JESSE FELDMAN,
MURRY J. WALDMAN,

By /s/ MURRY J. WALDMAN,
Attorneys for Plaintiff.

Lodged October 15, 1958.

[Endorsed]: Filed October 31, 1958.

[Title of District Court and Cause.]

## NOTICE OF APPEAL

Notice Is Hereby Given that National Bonded Cars, Inc., Plaintiff-Appellant above named, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the Order denying plaintiff's motion for a preliminary injunction entered in this action on October 31, 1958.

PHILIP S. EHRLICH,
FELDMAN & O'DONNELL,
JESSE FELDMAN,
MURRY J. WALDMAN,

By /s/ MURRY J. WALDMAN,
Attorneys for Appellant, National Bonded Cars, Inc.

[Endorsed]: Filed November 21, 1958.

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[Title of District Court and Cause.]

## STATEMENT OF THE POINTS ON WHICH APPELLANT INTENDS TO RELY ON APPEAL

1. The Findings of Fact and Conclusions of Law adopted by the District Court in denying Plaintiff's motion for a preliminary injunction are erroneous and not supported by the evidence.

2. The District Court erred in refusing to give any effect to the preliminary injunction obtained by the Plaintiff in the proceeding in the Superior Court of California in and for the City and County of San Francisco entitled National Bonded Cars, Inc., v. F. Britton McConnell, as Insurance Commissioner of the State of California.

3. The District Court erred in refusing to permit the Plaintiff to introduce oral testimony at the hearing on its motion for a preliminary injunction.

Dated: November 20, 1958.

Respectfully submitted,

PHILIP S. EHRLICH,
FELDMAN & O'DONNELL,
JESSE FELDMAN,
MURRY J. WALDMAN,

By /s/ MURRY J. WALDMAN,
Attorneys for Appellant National Bonded Cars, Inc.

[Endorsed]: Filed November 24, 1958.

Office of the Attorney General
State of California
Edmund G. Brown
Attorney General

No. 57/148

November 21, 1957

OPINION OF EDMUND G. BROWN, ATTORNEY GENERAL; HAROLD B. HAAS, DEPUTY ATTORNEY GENERAL

The Honorable F. Britton McConnell, Insurance Commissioner of the State of California, has requested the opinion of this office whether business concerns, other than vendors of automobiles issuing in this State contracts which purport to guarantee (or "warrant") against failure within one year of specified parts of the running gear of used cars, are transacting insurance business.

Our conclusion may be summarized as follows:

Such organizations in the business of issuing such guarantees (or "warranties") are transacting insurance business in this State.

Analysis

The following is the statement of the problem by the commissioner:

"Several organizations have been formed in various states, including California, which issue so-

called 'warranties' or 'guarantees' for the benefit of automobile dealers and their purchasers. These so-called warranties or guarantees are sold in California by such organizations to automobile dealers who use them here as an inducement for the purchase of an automobile and either give or sell them to the automobile purchaser in connection with such purchase.

"The so-called 'warranties' or 'guarantees' fall into four general types:

"Type (1): A percentage discount from the cost of parts and repair service is provided the automobile owner for a specific period by the warranty organization, provided the repair work is done by the issuing dealer, or by an 'authorized warranty dealer,' or in other words one who participates in the use of these warranties. No inspection or test of parts is a condition of the warrantor's obligation. In the event the dealer making the repairs refuses to honor the warranty document and grant a discount, the warranty organization will pay the proper cash refund to the warranty holder through the issuing dealer. (See Exhibits I A (1), (2), (3), (4).)

"Type (2): The warrantor organization purports to inspect and test the automobile, prior to sale of the warranty to the car dealer. The warranty provides that the warrantor organization will bear the auto purchaser's cost of repair and replacement of designated parts in the event of failure thereof during a specified period. As a condition to payment

of such repair and replacement cost, the automobile purchaser must first obtain authorization from the warrantor organization to have the repair and replacement work done by the garage or mechanic selected by the automobile purchaser. (See Exhibits II A (1); III A (1), (2); IV A (1), (2); V A (1); VI A (1).)

"Type (3): The warrantor organization purports to inspect and test the automobile prior to sale of the warranty to the car dealer. The warranty guarantees that if inspected parts fail to give a minimum of one year's service under normal usage and wear, the warrantor organization itself will repair or replace such parts, including labor, without charge. The warranty stipulates that all repairs and replacements shall be performed or directed by an authorized representative of the warrantor organization. (See Exhibit VII A (1), (2).)

"Type (4): The warrantor, or guarantor organization issuing the Guarantee, or Warranty promises to bear the automobile purchaser's cost of replacement and repair of designated parts within a specified period. The Guarantee or Warranty does not recite or rest on any inspection by the warranty organization, but contains a certification by the guarantor or warrantor organization that the car dealer has inspected and tested the automobile. (See Exhibits VIII A (1), (2), (3).)"

Further details are furnished by the request for opinion but need not be stated here. Such organiza-

tions known to be operating in this State, or their attorneys, have been notified of the request and furnished a copy. The commissioner has also supplied us with copies of the relevant documents relating to several of these. The attorneys for two of these organizations have furnished helpful memoranda of law.

The picture drawn by the facts thus set forth and the relevant documents furnished is one more demonstration that modern business and industrial developments have often been accompanied by corresponding changes in financial risks which in turn have required changes in economic and social devices to minimize that risk.

The primary such device so far developed has been insurance.[1] Thus there has been a tremendous increase in the scope and volume of property insurance business and coverage in the twentieth century, from the initial field of coverage of ships and buildings against physical damage or destruction, to a network of risk-shifting contracts directed to the contingent loss potential of almost every commercial activity.

Another such device has been the seller's warranty as part of a sale of a chattel. The old common law rule that the buyer assumes the total of

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[1]Insurance is a contract whereby one undertakes to indemnify another against loss, damage, or liability arising from a contingent or unknown event." (Ins. Code, Sec. 22.)

the risks which are part of acquiring ownership is today subject to many exceptions, of both legislative and judicial creation, based upon contract theories of implied and express warranty and upon fraud theories. A similar concept of implied and express warranty extends to rendition of certain services, again under both a contract theory and a tort theory.[2] And, in turn, the contract to render services itself has been used, at least partially, as a risk-shifting device in response to the social needs thus created or realized.[3]

Because of the great difference of the regulatory and tax law applicable to insurance as contrasted with that law applying to warranties and service contracts, courts and lawyers have repeatedly faced the problem of classification between these categories as changes in risk-shifting devices have developed. This request for opinion calls for such a classification.

The first problem is one of simplification. It is obvious here that the problem cannot be met by treating each contract, whether labelled "warranty" or otherwise, as an isolated transaction. The conduct of the business of issuing such contracts in mass

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[2]Gagne v. Bertran, 43 Cal. 2d 481, 275 P. 2d 15; Crawford v. Duncan, 61 Cal. App. 647, 215 Pac. 573.

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[3]California Physicians' Service v. Garrison, 28 Cal. 2d 790; 172 P. 2d 4; Transportation Guar. Co. v. Jellins, 29 Cal. 2d 242, 174 P. 2d 625.

is brought into question, not merely whether the particular contract by its terms is insurance.[4]

Likewise, we must consider the contention that certain of the contracts are service or maintenance contracts and not insurance. Contracts which were construed as agreements to furnish services as and when needed have in some cases been held to be contracts for service, not insurance contracts, despite the contingency element. On this point our Supreme Court said:

"Absence or presence of assumption of risk or peril is not the sole test to be applied in determining its [the contract] status. The question, more broadly, is whether, looking at the plan of operation as a whole, 'service' rather than 'indemnity' is its principal object and purpose" (Cal. Physicians' Service v. Garrison, 28 Cal. 2d 790, 809, 172 P. 2d 4; cf. Transportation Guar. Co. v. Jellins, 29 Cal. 2d 242, 174 P. 2d 625).

However, we see no substantial element of the service contract in the contracts here involved. It is true that most provide for inspection prior to issuance of the contract and limit liability of the

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[4]Consequently, such cases as James Eva Estate v. Oakland B. & M. Co., 40 Cal. App. 515, 181 Pac. 415, upholding the validity of a surety bond subscribed by a brewing corporation to protect a landlord, and Garratt v. Baker, 5 Cal. 2d 745, 56 P. 2d 225, upholding a single contract by members of a co-partnership to pay an annuity to the widow of the first partner to die, have no relevance to this problem.

contract-issuing organization to vehicles thus inspected and accepted, whether by the automobile dealer or by such organization, but the inspection is at most a condition precedent. No subsequent servicing is contemplated as to a car which passes inspection and on which a so-called "warranty" has been issued, except by way of "protection" from the expense of purchasing and installing, or repairing, a part of the running gear which has, after the "warranty" contract was issued, failed to function. This is not "service"; it is "indemnity."

Furthermore, the idea that the contracts are sold as, or represented to be, "service" is just a bit beyond the practicalities. This is the case whether the transactions be viewed as contracts with the dealer for the benefit of the car purchasers or directly with the purchasers.

The maintenance of, or availability of, mechanic forces and tools, is, of course, essential to any dealer's business. He has no occasion to purchase inspections of his cars from one of these organizations, except for the indemnity aspect in connection with his sale of the car.

The car buyer, likewise, desires and buys in contemplation of avoiding loss from failure of the running gear to function. So far as he is concerned, if he can get this, with or without inspection, it is what he wants. Basically, the inspection, if any, is for the protection of the contract-issuing organization, to enable it to refuse to "warrant" or guaran-

tee the running gear of the car; that is, the inspection is a part of the "selection" or "underwriting" function, analogous to a life insurer's, steam boiler insurer's, or fire insurer's inspection of certain or all "risks."

Most emphatically, however, the concerns engaged in this car-"warranty" business contend that they are merely making warranties, not insuring. In brief, they argue that their contracts merely provide that they inspect the cars and warrant the efficiency of the inspection. This, they claim, is not the conduct of an insurance business. Examination of the basic elements of the fields of "insurance" and "warranty," however, does not, we think, support this contention.

It is true that the law of warranty is not confined to the sale of tangible chattels:

"Strict liability has also been imposed for innocent misrepresentations of facts that the maker purported to know, that the recipient relied on in matters affecting his economic interests, and that the maker positively affirmed under circumstances that justify the conclusion that he assumed responsibility for their accuracy" (Gagne v. Bertran, 43 Cal. 2d 481, 486; 275 P. 2d 15).

In California law such liability as to service contracts is illustrated by Crawford v. Duncan, 61 Cal. App. 647, 215 Pac. 573. There a physician was held liable for breach of an express warranty that he would treat swollen glands on plaintiff's neck with

radium without leaving any permanent scar. Such permanent healing did not take place. The action was brought after the running of the one-year statute of limitations on actions for injury to the person. On appeal from a nonsuit order based on that statute of limitations, the court said:

"This is not an action of tort. That is, it is not an action for malpractice based on negligence. It is an action for breach of an alleged oral agreement whereby defendant warranted that his radium treatments would not leave a permanent scar. It is subdivision 1 of section 339 of the Code of Civil Procedure, therefore, and not subdivision 3 of section 340 of that code, which is applicable; and the statute of limitations did not run until the expiration of two years from the time when plaintiff's cause of action accrued" (61 Cal. App. 647, 650).

On the other hand, the distinction between such liability and the common-law obligation that services to be performed under a contract will be performed with due care and without negligence is illustrated by Gagne v. Bertran, supra. In that case, defendant had been hired to test drill a building site. The purpose of the test drilling was to determine whether there was "fill" present, in view of a city ordinance which required the depth of foundation of the building to be erected to be 18 inches below the natural ground surface. Defendant made the test drillings negligently, reporting no fill below 16 inches. The first foundation digging developed areas with 3 to 6 feet of fill, substantially increas-

ing the cost of the foundations. Action was brought by a complaint stating alternative theories of recovery: (1) breach of warranty, (2) deceit, and (3) negligence. Held, the counts on deceit and negligence were good, but not the count on breach of warranty:

"The evidence in the present case does not justify the imposition of the strict liability of a warranty. There was no express warranty agreement, and there is nothing in the evidence to indicate that defendant assumed responsibility for the accuracy of his statements. He did not, as did the defendant in Crawford v. Duncan [supra] * * *, tender plaintiffs an 'absolute promise' that the result of his test would be accurate. He was not a seller of property who obligated himself as part of his bargain to convey property in the condition represented. The amount of his fee and the fact that he was paid by the hour also indicate that he was selling service and not insurance. Thus the general rule is applicable that those who sell their services for the guidance of others in their economic, financial, and personal affairs are not liable in the absence of negligence or personal misconduct" (43 Cal. 2d 481, 487; 275 P. 2d 15; emphasis supplied).

We would not interpret this case as necessarily holding that any promissory warranty which expressly assumes the risk of loss in consequence of the failure of a service to achieve the promised results takes the promisor into the field of insurance. For instance, the learned writer of the Gagne opin-

ion therein points to several warranties, implied by common law, or imposed by statute, which cannot conceivably have this effect (see 43 Cal. 2d 481, at pp. 486-487, ftn. 1, 2). But these statements do emphasize the principle that neither the purported form of the contract nor the fact that a "warranty" or "guarantee" may be involved is decisive of the question of whether the business of issuance of the contracts is, or is not, insurance. It is particularly significant, we think, that the court, in passing on whether or not the "strict liability" of a warranty should be imposed in connection with a contract to render service, referred by implication to the test laid down by it in California Physicians' Service, supra, and restated in Transportation Guar. Co., supra, for determining whether a transaction was service on the one hand or insurance on the other:

"The question, more broadly, is whether, looking at the plan of operation as a whole, 'service' rather than 'indemnity' is its principal object and purpose" (28 Cal. 2d at 790).

Nor was this reference in the Gagne case to the "service" vs. "insurance" test a mere chance expression. First used in the opinion as the criterion for determining that the "strict liability" of a warranty was not justified on the facts in the record, the opinion repeats the test in holding that the facts did support a cause of action for negligence:

"The services of experts are sought because of their special skill. They have a duty to exercise the ordinary skill and competence of members of their

profession, and a failure to discharge that duty will subject them to liability for negligence. Those who hire such persons are not justified in expecting infallibility, but can expect only reasonable care and competence. They purchase service, not insurance" (43 Cal. 2d 481, 489).

It is of interest that an earlier California case foreshadows essentially the same test. In Title Ins. & Trust Co. v. Los Angeles, 61 Cal. App. 232, 234, 214 Pac. 667 (Supr. Ct. hrg. den.), it was held that the issuance of contracts providing that "after a careful examination of the official records of the county of Los Angeles, state of California, and of the records of the federal offices located at Los Angeles, in relation to the title of that certain real property hereinafter described, the ..... Company, a corporation, having its principal place of business in the city and county of Los Angeles, state of California, hereby guarantees that the title to said property as it appears from said records, is vested in ....." was insurance business.

The court referred to Lattin v. Gillette, 95 Cal. 317, 30 Pac. 545, in which defendants had furnished a certificate stating that after examining the title records "we find the same vested in Jacob Birnbaum free from all incumbrances" (emphasis by the court, 61 Cal. App. 232, 236). That Lattin case, holding the certificate not to be insurance, was distinguished on the ground that:

"There was not, as there is in the present case, a contract guaranteeing that the record and its legal

effect were as stated in the certificate. In the Lattin case there was merely the contract implied in the acceptance of the employment, that the records would be carefully examined, and that the defendants would in good faith state their opinion concerning the effect of the records. They would be liable for negligent or other failure to perform that contract. The right of action would accrue at once upon issuance of the certificate, and it would be an action to recover damages for breach of contract. But in the case of a certificate like that now before us, the party entitled to the benefit of the guaranty has a right of action to recover upon the contract contained in the certificate itself, and the liability is one that does not accrue until discovery of the loss that may be incurred if the title is not as represented in the certificate'' (61 Cal. App. 232, 236).

Our attention has been called to cases from other jurisdictions which, it is contended, apply in principle to this question, holding that various contracts are not insurance contracts.[5] To discuss these in

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[5]People v. May, 162 App. Div. 215, 147 N.Y.S. 487, aff'd 212 N.Y. 561, 106 N.E. 1039 (financial report service assumed liability for accuracy of report at time of investigation; excluded subsequent changes of financial condition or the results thereof);

State v. Standard Oil Co., 138 Ohio St. 376, 35 N.E. 2d 437 (tire vendor guaranteed against failure from faulty construction or material, expressly excluding various damages from external causes such as punctures, fires, etc.);

Cole v. Haven (Ia.) 7 N.W. 383 (lightning rod dealer, upon sale of lightning rod, agreed to pay

detail would be of little value and would also require discussion of a number of cases which seem to be contra.[6] Examination develops only differences which seem to arise out of local statutes and decisions.

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all lightning damages resulting to building upon which rod was installed, within given time after installation);

Evans & Tate v. Premier Refining Co., 31 Ga. App. 303, 120 S.E. 553 (vendor of gear lubricant "insured" purchasers from vendee against breakage of gears by natural wear and tear);

See also: Moresh v. O'Regan, 120 N.J. Eq. 534, 187 Atl. 619; reversed on other grounds, 122 N.J. Eq. 388, 194 Atl. 156 (contract to care for and replace plate glass on breakage; court disapproved Peo. v. Stand. Plate Glass & Salvage Co., n. 2, infra).

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[6]State v. Western Auto Supply Co., 134 Ohio St. 163, 16 N.E. 2d 256, 119 A.L.R. 1236 (tire vendor warranted tire against damage from various or all causes, not limited to defects of material or workmanship);

Physicians' Defense Co. v. Cooper, 199 Fed. 576 (organization agreed to defend physician in case he was sued for malpractice during certain future period);

Ollendorff Watch Co. v. Pink, 279 N.Y. 32, 17 N.E. 2d 676 (watch vendor agreed to replace watch if stolen within one year from purchase, reciting in certificate that same was based on insurance policy maintained in force by vendor);

See also: People v. Standard Plate Glass & Salvage Co., 174 App. Div. 501, 156 N.Y.S. 1012 (defendant's contract proposed to care for and putty plate glass in its frame and replace it if broken; court said the puttying provision was in the nature of an inspection and was really for the protection of defendant).

It is worth noting, however, that a number of Attorneys General have advised their various State Insurance Departments on this subject. Those holding that the agreements or business are not insurance seem to do so on the assumption that the inspection by the contract-issuing firm can and will be such that there is but remote possibility of a flaw in the running gear escaping detection by inspection and that consequently the firm has in effect the same control over the product, the inspected automobile, as a manufacturer who warrants tangible goods against defects of material or workmanship.[7] The contra opinions seem to be based, on the whole, upon the principle that the basic purpose of the transactions is the creation of an indemnity contract for sales purposes.[8] It seems to us that the latter are more realistic and tend to parallel the "service-or-indemnity" alternative repeatedly enunciated by our own Supreme Court.

It is therefore our opinion that the transactions described by the commissioner constitute transaction of an insurance business.

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[7]N.Y., Jan. 9, 1957, Weekly Underwriter I.D.S. 1957, N.Y. 5;
Alabama, April 19, 1957;
Florida, Sept. 14, 1956, Weekly Underwriter I.D.S. 1956, Fla. 87; this assumption, we feel, cannot be made here; such information as we have is to the contrary.

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[8]Nevada, No. 298, Aug. 20, 1957, Weekly Underwriter I.D.S. 1957, Nev. 4;
Kentucky, Aug. 28, 1957, Weekly Underwriter I.D.S. 1957, Ky. 24.

While the general public policy involved does not here influence our views one way or the other, it seems but reasonable to call attention to the facts. Several of these concerns are presently in operation in California. Many of these contracts have already been issued in this State. There are no present practical means other than insurance regulatory laws whereby the public can be protected from failure of any of these contract-issuing organizations to maintain means of meeting these obligations to the public. On the one hand, at least one of the organizations operating on a national scale has for some time prudently and properly maintained an insurance policy in force for the purpose of indemnifying its losses under its "warranty" contracts. This alone is ample demonstration that the business so developed can successfully qualify under the insurance regulatory laws without fatally handicapping its development. But on the other hand, another company doing this type of business in this State has failed, leaving warranty holders remediless.

The foregoing are our views on the basic question. We now proceed to answer the specific questions asked:

"1. Do any, or all, of the documents designated variously as 'warranties' or 'guarantees' constitute an insurance contract within the meaning of California Insurance Code Section 22?"

Our answer is in the affirmative.

"2. Does either the issuance or sale of such documents considered in the light of the facts herein set forth and the provisions of Insurance Code Section 700, constitute the transaction of insurance which would require the application for and the obtaining of a Certificate of Authority from the Insurance Commissioner?"

Our answer is in the affirmative.

"3. If your answer to either Questions No. 1 or No. 2 is in the affirmative, what classes of insurance as defined in Section 100 of the California Insurance Code are involved?"

This might depend somewhat on the circumstances and form (see sec. 121, Ins. Code). However, it would appear that these contracts all deal with a hazard arising out of "ownership" or "use" of an automobile and consequently fall in class 16, "Automobile insurance" (sec. 116, Ins. Code).

"4. Would the answer to any of the preceding questions be different if it were determined:

"(a) That no inspection of the vehicle parts specified in the documents is made by any one;

"(b) That such inspection was made by the motor vehicle dealer but was not made by the organization issuing the warranty;

"(c) That the inspection was made by an independent contractor who was neither an employee of the dealer nor an employee of the organization issuing the document;

"(d) That the only inspection of the vehicle was made by the manufacturer thereof and that no inspection was made by any other person, firm or organization;

"(e) That the inspection is actually made by the guarantor corporation although the guarantee by its terms purports to rest upon an inspection by the automobile dealer?"

Our answer is in the negative.

"5. We do not answer the fifth question since we do not believe that the fact of inspection is determinative in the cases specified.

"6. Would your answer to any of above questions be different if the following language was added to the provisions of the warranty or guarantee:

" 'It shall be presumed that in the case of failure of the parts listed in this warranty, and subject to the provisions herein, that the same resulted from defects in material or workmanship.' "

Our answer is in the negative.

"7. Would your answer to any of the above questions be different if the warranties or guaranties were limited in their application to new cars as distinguished from used cars; or if applicable to used cars were limited to cars manufactured within the five-year period immediately preceding issuance of the warranty?"

Our answer is in the negative.

"8. Would your answer to any of the preceding questions be different if the automobile purchaser was not charged for the warranty or guarantee by the auto dealer?"

Our answer is in the negative.

"9. Does the existence of a policy of insurance of an insurer (admitted or nonadmitted), promising to indemnify the organization for losses sustained under the warranties, affect any of your answers to the foregoing questions?"

Our answer is in the negative.

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Superior Court of the State of California, in and for the City and County of San Francisco

No. 475485

NATIONAL BONDED CARS, INC., a Corporation,

Plaintiff,

vs.

F. BRITTON McCONNELL, as Insurance Commissioner of the State of California,

Defendant.

## COMPLAINT FOR DECLARATORY RELIEF AND FOR AN INJUNCTION

Comes Now the above-named plaintiff and for cause of action against the above-named defendant complains and alleges as follows:

I.

Plaintiff is a corporation organized under the laws of the State of New Jersey and licensed to do business therein and is doing and has been doing an interstate business in the State of California. It conducts the business of inspecting new or used vehicles, for franchised automobile dealers only, throughout the United States. Its inspection and examination, limited to those parts of an automobile where inspection can determine, with accuracy, whether or not repairs or replacements of those parts will be required during the ensuing year under normal usage, is the basis of the certification and warranty issued by it on each car which meets its rigid inspection and specifications.

The parts certified and warranted after inspection by plaintiff are specifically listed in the warranty. The warranty clearly states that it does not protect the purchaser of the automobile for repairs or replacements not specifically listed, nor for adjustments, and that it does not cover repairs necessary because of collision, negligence, or misuse or major alterations not recommended by the manufacturer.

II.

That plaintiff had been engaged in said business in the State of New Jersey, since March 26, 1954, and thereafter in about 40 other states of the Union.

III.

That the defendant, F. Britton McConnell, is the duly appointed, qualified and acting Insurance Com-

missioner of the State of California, and is the head of the Department of Insurance of said State.

IV.

That plaintiff has heretofore franchised a great number of automobile dealers in the State of California under an agreement entitled Dealer's Franchise, copy of which is attached hereto, made a part hereof, and for reference is marked plaintiff's Exhibit "A."

V.

That by said franchise and agreement plaintiff agrees and has agreed with said dealers that it will inspect any automobiles owned by and in possession of the dealer at the place of business therein set forth and will thereupon furnish such automobile dealer a detailed report on the mechanical condition of the major parts thereof and in those instances where such report indicates that the mechanical condition of the automobile so inspected is sound and in good working order, and it is approved as per form prescribed by such dealer's franchise agreement, then plaintiff will issue its written warranty covering such specified parts of the automobile. That the warranty issued to dealers pursuant to such inspection of the mechanical condition of automobiles owned by such dealer is attached hereto and made a part hereof and for reference is marked plaintiff's Exhibit "B"; that the form of inspection report attached to and made a part of said warranty, showing the parts of the automobile warranted by plaintiff, is attached hereto and made a

part hereof and for reference is marked plaintiff's Exhibit "C."

VI.

That for some time prior to the year 1957 plaintiff conducted its business throughout the United States and particularly in the State of California unimpeded by any threat of regulation or jurisdiction of said state regulatory body or agency; that on or about said date the defendant questioned the right of plaintiff to transact business in the State of California, defendant contending that the said business constituted insurance. That on or about July 10, 1957, plaintiff was informed and advised that the defendant intended to and would submit to the Attorney General of California a request for an opinion whether the automobile warranty or guaranty constituted the transaction of insurance, and on or about August 5, 1957, said request was actually submitted. That on November 21, 1957, the Attorney General rendered Opinion No. 57/148, holding that "such organizations in the business of issuing such guaranties (or 'warranties') are transacting insurance in this state."

VII.

That since the rendition of said opinion and the receipt thereof by the defendant, the defendant has notified plaintiff that in order to engage in its business of issuing its warranty or guaranty certificates to purchasers of automobiles in this state it must qualify as an insurance company and procure from the California Insurance Commissioner a certificate

of authority to transact insurance, and request is therein made that on or before January 15, 1958, the defendant be furnished a written statement specifying what actions have been taken to assure prompt discontinuance of the alleged illegal activity of plaintiff in the conduct of its business in this state. Said notification is dated December 23, 1957, and a copy thereof is attached hereto, made a part hereof and marked plaintiff's Exhibit "D."

VIII.

That in many states where plaintiff now transacts said business of inspecting and warranting specified parts of the mechanical condition of automobiles, such transaction of business has been ruled upon by the Attorneys General thereof as being valid and not violative of any insurance laws of such states; that the Attorney General of the State of New York, the Honorable Jacob K. Javits (now United States Senator from the State of New York) rendered an opinion to the Superintendent of Insurance of New York, Honorable Laffert Holz, on January 9, 1957, holding that these same warranty contracts issued by plaintiff were not insurance contracts; that on April 19, 1957, the Attorney General of Alabama rendered an opinion to the Superintendent of the Department of Insurance of that state holding that such contracts were not insurance; that some time after June 29, 1956, the Attorney General of Florida advised the Insurance Commissioner of that state that said warranty agreement or certificate of plaintiff was not insur-

ance; that the attorney for the Commissioner of Insurance of the State of Virginia on October 14, 1955, advised that said warranty agreement was not insurance; that the General Counsel for the Insurance Department of the Commonwealth of Pennsylvania on September 14, 1956, advised that said warranty was not insurance; that the Chief Rate Analyst of the State of Massachusetts advised the Superintendent of the Forms Department of that state that said warranty was not insurance.

IX.

In the opinion of the Attorney General of California rendered to the defendant it is stated:

"While the general public policy involved does not here influence our views one way or the other, it seems but reasonable to call attention to the facts. Several of these concerns are presently in operation in California. Many of these contracts have already been issued in this State. There are no present practical means other than insurance regulatory laws whereby the public can be protected from failure of any of these contract-issuing organizations to maintain means of meeting these obligations to the public. On the one hand, at least one of the organizations operating on a national scale has for some time prudently and properly maintained an insurance policy in force for the purpose of indemnifying its losses under its 'warranty' contracts. This alone is ample demonstration that the business so developed can successfully qualify under

the insurance regulatory laws without fatally handicapping its development. But on the other hand, another company doing this type of business in this State has failed, leaving warranty holders remediless." (Underscoring added.)

X.

That in consequence of said opinion of the Attorney General of this state and the action taken by the defendant pursuant thereto evidenced by Exhibit "D" plaintiff is threatened with disruption of its substantial business conducted in this state with a great many automobile dealers and purchasers of automobiles therefrom who are and have been furnished said warranty agreement.

That a controversy therefore exists between plaintiff and defendant whether the contracts plaintiff issues are in fact insurance.

XI.

That defendant will, unless restrained pending the determination of the question whether or not such contracts are in fact insurance within the meaning and definition thereof as contained in Section 22 of the Insurance Code of California, take such action as is authorized by said Insurance Code to prosecute, enjoin plaintiff, or seize such business as may be located in this state, which such action will cause irreparable damage to plaintiff and cause great loss to plaintiff and to its customers.

XII.

That plaintiff has no plain, speedy and adequate remedy at law and it and its agents, servants and employees are threatened with oppressive prosecution under the penal provisions of said Insurance Code of California; that the terms, requirements and demands of defendant's said order of "cease and desist" issued and delivered to plaintiff as set forth in Exhibit "O" attached hereto are oppressive, unlawful, confiscatory and deprive plaintiff of property without due process of law and violate the provisions of the Fifth and Fourteenth Amendments to the Constitution of the United States and Article I, Section 13 (clause sixth) of the Constitution of the State of California.

XIII.

That the defendant herein proposes to, threatens to and will, unless restrained by the Court, cause plaintiff, its agents, servants and employees to be prosecuted for violation of provisions of the Insurance Code of California, none of which are applicable to the type and character of the lawful business carried on by plaintiff, and will otherwise harass and oppress plaintiff, its agents, servants and employees unless restrained by this Court.

XIV.

That defendant also has mentioned orally still another more drastic procedure which he proposes and threatens to use against plaintiff unless plaintiff immediately ceases and desists from engaging in its

lawful business in this state as described in paragraph I hereof, and that procedure so threatened is seizure of plaintiff's assets and property in this state under and pursuant to the provisions of Sections 1011, et seq., of the California Insurance Code; that such drastic procedure would cause great and irreparable injury and damage to plaintiff.

Wherefore, plaintiff prays:

1. For a Declaratory Judgment, adjudging and declaring that said defendant, as Insurance Commissioner of the State of California, and as head of the Department of Insurance of said State, has no jurisdiction or authority to require or compel plaintiff to qualify as an insurer or to procure a Certificate of Authority from him in order to engage in said business described in paragraph I of the Complaint herein, and adjudging and declaring that plaintiff's said business is not insurance as defined by the Insurance Code of California.

2. That an alternative injunction be issued pending the hearing of this action directing and commanding said defendant, as Insurance Commissioner of the State of California, his agents and employees of his department, to refrain from enforcing said order to "cease and desist" dated December 23, 1957, and attached hereto as plaintiff's Exhibit "D," and from causing the arrest of said plaintiff's agents, servants and employees and from taking the more drastic action and procedure of seizure of plaintiff's property, business and assets

located in this State, and from otherwise interfering with plaintiff, its agents, servants and employees in the carrying on of said described business and that upon the final hearing of this action, said injunction be made permanent.

3. For such other and further relief in the premises as justice may require.

NEIL CUNNINGHAM,
CRIDER, TILSON & RUPPE,

By JOE CRIDER, JR.,
Attorneys for Plaintiff.

Duly verified.

## EXHIBIT A

Originators of the 1 Year Warranty Plan for New Car Dealers

Dealer's Franchise

National Bonded Cars, Inc., agrees that it will for the duration of this agreement inspect any automobiles not older than 5 model years including the current model owned by and in the possession of the Dealer at its place of business hereinafter set forth, and will issue a warranty of the mechanical condition of each such car approved by it.

Dealer agrees to submit cars owned by it and offered or to be offered for sale, that in its opinion

will meet National Bonded Cars, Inc., inspection requirements during the existence of this agreement.

The total charge made by National Bonded Cars, Inc., to Dealer for its inspection, the issuance of a warranty thereon to the Dealer and the authorized delivery of such warranty by Dealer to purchaser of such car is $42.50 payable as follows:

Dealer agrees to pay National Bonded Cars, Inc., the sum of Fifteen ($15.00) Dollars per car at the time of completion of inspection and the issuance of a warranty. Upon each bona fide sale of such approved car, Dealer is authorized to deliver the warranty left with it covering such car on inspection and approval, to the purchaser thereof, and to send immediately the form attached thereto properly filled out to the local District Office of National Bonded Cars, Inc., together with payment of the balance of Twenty-seven Dollars and Fifty Cents ($27.50) then due to National Bonded Cars, Inc., whereupon the warranty of National Bonded Cars, Inc., will be in full force and effect.

After the initial inspection of Dealer's cars, National Bonded Cars, Inc., agrees to arrange a schedule of periodic inspections for cars subsequently acquired by Dealer. Dealer agrees to use its best efforts to co-operate with and aid the inspector of National Bonded Cars, Inc., during each such inspection visit.

On any claims arising and covered by the warranty of National Bonded Cars, Inc., it will inspect and authorize the necessary repairs. Upon satis-

factory completion of such authorized repairs immediate payment will be made.

This agreement shall remain in full force and effect from the date hereof unless written notice of the desire of either party to terminate the same shall be sent to the other at its address as herein stated at any time, which notice shall effect such termination forthwith.

In Witness Whereof ....., Dealer ....., of ....., Address ....., has duly executed this franchise agreement, which upon due execution thereof by National Bonded Cars, Inc., at its home office in the State of New Jersey shall be and become a binding franchise agreement between said Dealer and National Bonded Cars, Inc., as of the date herein set forth.

Dated ....., 195...

NATIONAL BONDED CARS, INC.,
120 Morris Ave., Springfield, N. J.,

By .....,
President.

Dealership by ....., Signature ....., Title .....

General Information

Make of Car Sold.....
New Car Sales Per Year (Approx.).....

Used Car Sales Per eYar (Approx.).....
Number of Salesmen Employed by Dealer.....
Retail Labor Rate Per Hour.....

....., 
(Signature of District
Representative.)

## EXHIBITS B & C

National Bonded Cars, Inc.
120 Morris Avenue
Springfield, N. J.

Warranty 311 No. 07993

Valid Anywhere in the United States of America

National Bonded Cars, Inc., certifies that it has inspected the vehicle below described and certifies that in its opinion the parts hereinafter specified are in good working order and condition and will with normal usage require no repairs or replacements for one (1) year from the date of purchase. National Bonded Cars, Inc., agrees that if its said certification is in error, it will protect the retail purchaser of this vehicle and holder of this Warranty from any costs of repairs which may arise for one year from date of purchase on the following specific parts subject to the terms and conditions hereinafter set forth to the extent of the total reasonable price for repairs, replacement and labor

which become necessary in the normal use of the below motor car:

Motor: Pistons, pins and rings, valves, valve lifters, valve stems, valve guides, valve springs, oil pump and timing gears. Camshaft, Crankshaft, Bearings and gaskets.

Standard Transmission: Gears, seals and bearings within housing.

Automatic Transmission: Gears, seals and bearings within housing and electrical mechanism in transmission.

Rear Axle: Gears, bearings, oil seals and gaskets within housing.

Clutch: Disc. Pressure plate. Release bearings.

Steering: Front axle assembly (except alignment and adjustments). Power steering.

Brakes: Master brake cylinder. Wheel cylinders. Power brakes.

(Seals and gaskets to be replaced only with other repairs.)

This Warranty is for the exclusive use of the dealer to whom issued and of the retail owner named herein and is not transferrable.

This Warranty is restricted to passenger cars which are not operated for commercial use.

This Warranty is in full force for one year from the date of purchase noted hereon provided only, however, that a written confirmation from National

Bonded Cars, Inc., of protection hereunder is received by the holder of this Warranty within twenty (20) days from date of purchase.

The necessity for repairs or replacement under this Warranty shall remain in the sole discretion and judgment of National Bonded Cars, Inc. Written authorization must first be obtained before any repairs are made.

The holder of this Warranty is not protected for repairs or replacements not specifically listed in this Warranty for adjustments or tune-ups, for repairs arising out of or revealed by collision or upset, regardless of the contention that the specific failure was not caused by the collision or upset, nor for any repairs caused by neglect, misuse or resulting from major alterations by Warranty holder not recommended by manufacturer.

This Warranty does not cover repairs or replacements necessitated by loss or damage resulting from fire, water, windstorm, hail, lightning, or earthquake, nor during the period when such car has been stolen and is out of the control of the owner named below.

National Bonded Cars, Inc., assumes no liability under this Warranty for delays or failure hereunder caused by acts of God, government, labor difficulties or causes beyond its control or for damages resulting from delays in performing the services under this Warranty or for any consequential damages whatsoever.

The terms and conditions of this Warranty cannot be modified or extended except by an express agreement in writing between the Warranty holder and National Bonded Cars, Inc.

Notify National Bonded Cars, Inc., immediately if you do not receive required written confirmation from it or protection hereunder within twenty days from date of purchase.

Notice of any needed repairs or replacements covered by this Warranty must be given immediately to National Bonded Cars, Inc.

This Warranty Protects.....
Issued by .....
Owner of ..... Year ..... Make .....
Serial No..... Body Type..... Date of Purchase .....

[Coupon]

311 No. 07993

Year ..... Make..... Serial No.....
Body Type..... Date of Purchase.....

Home Office Use Only

Year, Make, Ser. No., Effective Date, N or U Car, Dealer No., Spdmtr. Rdg., Inspectors No., CA Code.

Dealership..... City.....
Signature.....

Purchaser's Name (Print or Type).....
Street Address (Print or Type).....

City (Print or Type).....
Purchaser's Signature .....
Dealer's Stock Number.....

Home Office Copy.

10/10/57—Form 101-1

National Bonded Cars, Inc.

Instructions

1. This is your Warranty. It is a valuable document. Read it carefully, then place it in your Car's Glove Compartment. When your Confirmation Card arrives attach it to this Warranty and keep both in your car.

2. If you have a mechanical failure, check your Warranty to see if the failure is listed.

3. If you are in your local area, call the National Bonded Cars, Inc., District Office.

4. If you are out of State, ask Information for the local N.B.C. Office. If one is not available phone, wire, or write National Bonded Cars, Inc., 120 Morris Avenue, Springfield, N. J. (DRexel 6-4900).

5. Important! Authorization Must First Be Obtained Before Any Repairs Are Made * * * Have Your Warranty Symbol and Number Available When You Call, and Be Sure They Appear on All Correspondence Sent to National Bonded Cars, Inc.

National Bonded Cars Has District Offices in Most Major Cities in the United States.

The use of the Maintenance Guide is urged for proper operation of your car while under warranty by National Bonded Cars, Inc.

Maintenance Guide

Lubricate Chassis: 1,000 Miles.

Change Engine Oil: 2,000 Miles. (Type and grade oils as recommended by car manufacturer. Not multiviscosity oil.)

Change Oil Filter Cartridge: 4,000 Miles.

Engine Tune-up: 5,000 Miles.

Check Brake Master Cylinder Fluid Level: 5,000 Miles.

Adjust Brakes: 5,000 Miles.

Cross-Switch Tires: 5,000 Miles.

Clean and Repack Front Wheel Bearings: 10,000 Miles.

Change Transmission (Standard or Overdrive) Lubricant: 10,000 miles.

Adjust Automatic Bands and Change Fluid: 15,-000 Miles.

Repack Universal Joints: 20,000 Miles.

For Proper Servicing of Your Car May We Suggest You Return to Your Selling Dealer.

"Drive Safely"
"The Life You Save May Be Your Own"

EXHIBIT D

F. Britton McConnell
Insurance Commissioner

Goodwin J. Knight
Governor

State of California
Department of Insurance
1182 Market Street
San Francisco 2

December 23, 1957.

National Bonded Cars, Inc.,
c/o Joe Crider, Jr., Esq.,
Crider, Tilson & Ruppe, Attorneys-at-Law,
548 South Spring Street,
Los Angeles 13, California.

Subject: California Attorney General's Opinion (No. 57/148), Dated November 21, 1957. Re: Automobile Warranties.

Gentlemen:

A copy of the subject Opinion wherein it is stated that organizations in the business of issuing guarantees (or "warranties") described in the Opinion are transacting insurance business in California has been previously mailed to you by the Attorney General.

In order to engage in such insurance business in this state, it is mandatory that a Certificate of Authority be procured from the California Insurance Commissioner. It is our duty and intention to fully enforce the law.

Request is hereby made that on or before January 15, 1958, this office be furnished a written statement by an executive officer, and your attorney if you wish, specifying what actions have been taken to assure prompt discontinuance of such illegal activity in this state.

Very truly yours,

F. BRITTON McCONNELL,
Insurance Commissioner;

By /s/ MERVIN R. SAMUEL,
Chief, Compliance and Legal Division.

MRS:dk

[Endorsed]: Filed October 7, 1958.

In the Superior Court of the State of California, in and for the City and County of San Francisco

No. 475485

NATIONAL BONDED CARS, INC., a Corporation,

Plaintiff,

vs.

F. BRITTON McCONNELL, as Insurance Commissioner of the State of California,

Defendant.

F. BRITTON McCONNELL, Insurance Commissioner of the State of California,

Cross-Complainant,

vs.

NATIONAL BONDED CARS, INC., a Corporation; SUN INSURANCE OFFICE, LTD., a Corporation, and AMERICAN EMPLOYERS INSURANCE CO., a Corporation,

Cross-Defendants.

## CROSS-COMPLAINT FOR INJUNCTION

Now comes defendant in the above-entitled action and cross-complains against National Bonded Cars, Inc., a corporation; Sun Insurance Office, Ltd., a corporation, and American Employers Insurance Co., a corporation, as follows:

I.

Refers to, realleges and incorporates herein as though here set forth in full, paragraphs I, II, III, IV, V, VI and VII of defendant's answer to the complaint in this action; that a copy of said answer is attached hereto.

II.

That cross-defendants Sun Insurance Office, Ltd., and American Employers Insurance Co. are foreign Corporations, duly licensed to transact insurance business in the State of California.

III.

That cross-defendant and plaintiff, National Bonded Cars, Inc., is engaged in transacting insurance business in the State of California as alleged in paragraph I of defendant's answer which is incorporated in this cross-complaint by paragraph I hereof.

IV.

That cross-defendants Sun Insurance Office, Ltd., and American Employers Insurance Co. have participated, aided, and abetted, and now continue to participate, aid and abet, in such transaction of insurance in this State by plaintiff and cross-defendant National Bonded Cars, Inc., by insuring payment of the liability of National Bonded Cars, Inc., under the contracts embodied in the documents issued by National Bonded Cars, Inc., referred to in subparagraphs (b) through (f) of paragraph I of defendant's answer to the complaint in this action, which is incorporated herein by paragraph I of this cross-complaint.

Wherefore, defendant and cross-complaint prays judgment:

1. For a permanent injunction, enjoining and restraining plaintiff and cross-defendant, National Bonded Cars, Inc.:

(a) From engaging in the business of issuing its purported "auto warranty" agreements or any substantially similar documents for consideration in this State without first procuring a certificate of authority from the Insurance Commissioner permitting it so to act, and

(b) From soliciting, negotiating or otherwise arranging with automobile dealers for such issuance unless so licensed.

2. For such injunction restraining cross-defendants Sun Insurance Office, Ltd., and American Employers Insurance Co. from in any manner insuring or otherwise aiding or abetting plaintiff and cross-defendant National Bonded Cars, Inc., in such business unless and until said National Bonded Cars, Inc., is so licensed; and

3. For defendant and cross-complainant's costs herein and for such other relief as to this Court seems proper.

Dated: March 21, 1958.

EDMUND G. BROWN,
Attorney General;

HAROLD B. HAAS,
Deputy Attorney General, Attorneys for Defendant and Cross-Complainant.

PLAINTIFF'S EXHIBIT No. 2

Superior Court of the State of California for the City and County of San Francisco

No. 475485

NATIONAL BONDED CARS, INC., a Corporation,

Plaintiff,

vs.

F. BRITTON McCONNELL, as Insurance Commissioner of the State of California,

Defendant.

## PRELIMINARY INJUNCTION

The above-entitled matter having regularly come on for hearing in Department 21 on the 23rd day of January, 1958, pursuant to an order to show cause why a preliminary injunction should not issue and plaintiff appearing by its counsel, Neil Cunningham and Crider, Tilson & Ruppe, by Joe Crider, Jr., and defendant appearing by his counsel, Edmund G. Brown, Attorney General of the State of California, by Harold B. Haas, Deputy Attorney General of the State of California, and the court being fully advised in the premises, and good cause appearing therefor,

It Is Ordered that during the pendency of this action, or until the court shall otherwise order, the defendant, and his agents, servants, employees and

representatives, shall be and hereby are enjoined and restrained from engaging in or performing, directly or indirectly, any and all of the following acts:

(a) Enforcing the order to plaintiff to cease and desist its business in the State of California as set forth in the complaint on file herein and from causing the arrest of said plaintiff's agents, servants and employees from taking action to seize plaintiff's property, business and assets located in the State of California, or

(b) Interfering with plaintiff, its agents, servants and employees in the carrying on of its business in the State of California as described in the complaint on file herein.

It Is Further Ordered that the preliminary injunction as hereinabove set forth shall issue upon plaintiff's filing an undertaking in the sum of $5,000.00 in due form as required by law.

Dated this 28th day of January, 1958.

MILTON D. SAPIRO,
Judge of the Superior Court.

Duly verified.

Receipt of Copy asknowledged.

[Endorsed]: Filed October 7, 1958.

[Title of District Court and Cause.]

## CERTIFICATE OF CLERK TO RECORD ON APPEAL

I, C. W. Calbreath, Clerk of the United States District Court for the Northern District of California, hereby certify the foregoing and accompanying documents listed below, are the originals filed in this Court in the above-entitled case and constitute the record on appeal herein as designated by counsel for the Appellant, Except the Affidavit of A. E. Hacking and the Designation by Appellees are not included for the reason such pleadings do not appear among the records in this office:

Excerpt from Docket Entries.

Complaint.

Notice and Motion for Preliminary Injunction.

Affidavit of Geoffrey K. Clowes in Support of Preliminary Injunction.

Answer of Donald D. Lynch.

Answer and Counterclaim of A. E. Hacking.

Affidavit of C. J. Schnabel.

Affidavit of L. C. Fox.

Affidavit of George Kuhn.

Affidavit of Verne F. Garrett.

Counter Affidavit of Jack L. Robertson and Central Agency.

Affidavit of Donald Brooks.

Affidavit of Francis B. Ryan on behalf of defendants Ryan, Brooks, Renz and Nadia.

Affidavit of John P. Devaney.

Affidavit of E. N. Hacker.

Memorandum of Court Denying Application for Preliminary Injunction.

Proposed Modifications to Findings of Fact and Conclusions of Law.

Findings of Fact and Conclusions of Law.

Order Denying Preliminary Injunction.

Notice of Appeal.

Appeal Bond.

Appellant's Designation of Record on Appeal.

Statement of Points Upon Which Appellant Intends to Rely on Appeal.

The following copies of pleadings in Case No. 475,485 in the Superior Court of the State of California, in and for the City and County of San Francisco.

Complaint (Plaintiff's Exhibit 1 in the U. S. District Court Case 37635-Civil).

Cross-Complaint for Injunction.

Preliminary Injunction (Plaintiff's Exhibit 2 in U. S. District Court).

Opinion of Edmund G. Brown, Attorney General of the State of California, No. 57/148, November 21, 1957.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court this 8th day of December, 1958.

C. W. CALBREATH,
Clerk;

[Seal] By /s/ MARGARET P. BLAIR,
Deputy Clerk.

[Endorsed]: No. 16293. United States Court of Appeals for the Ninth Circuit. National Bonded Cars, Inc., Appellant, vs. Francis B. Ryan, et al., Appellees. Transcript of Record. Appeal from the United States District Court for the Northern District of California, Southern Division.

Filed: December 8, 1958.

Docketed December 18, 1958.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.